

San Diego International Law Journal

Volume 16
Issue 1 *Fall 2014*

Article 5

2014

The United States versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance

Chandra Zdenek

Follow this and additional works at: <https://digital.sandiego.edu/ilj>



Part of the [International Law Commons](#)

Recommended Citation

Chandra Zdenek, *The United States versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance*, 16 San Diego Int'l L.J. 209 (2014)

Available at: <https://digital.sandiego.edu/ilj/vol16/iss1/5>

This Comment is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego International Law Journal* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

The United States versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance

CHANDRA ZDENEK*

TABLE OF CONTENTS

I.	BACKGROUND.....	211
II.	THE UNITED STATES VERSUS JAPAN AS MEMBER STATES TO THE CONVENTION	213
III.	THE PROBLEM OF NATIONALISTIC BIAS AND STRATEGIC INTERPRETATION	215
	A. <i>The Problem of Exception Over-Breadth</i>	217
	1. <i>U.S. Judicial Interpretation of the Article 13(b)</i>	217
	2. <i>Japan's Prospective Interpretation of the Article 13(b) Exception</i>	223
	a. <i>Japanese Domestic Family Law and Family Court System</i>	224
	b. <i>Japan's Motive to Protect Female Citizens from Domestic Violence</i>	230
	B. <i>Difficulties Arising from Japan's Implementing Legislation</i>	233
	C. <i>Circumstances of Japan's Ratification as a Factor Indicating Conflict</i>	236
IV.	A PROSPECTIVE INTERNATIONAL SOLUTION.....	237
	A. <i>Mediation as a Means of Achieving Neutrality in Convention Enforcement</i>	238

* © 2014 Chandra Zdenek. J.D. candidate 2015, University of San Diego School of Law. B.A. 2011, Political Science, University of Colorado, Boulder. Special thanks to University of San Diego School of Law Professor Robert C. Fellmeth for his guidance and support throughout my writing process.

B.	<i>Mediation: Background, Advantages, and Limitations</i>	239
C.	<i>The Proposed International Mediation System as an Effective Mechanism</i>	242
1.	<i>Undertakings as a Component of International Mediation</i>	244
2.	<i>Measures Expanding International Mediator Authority to Secure Convention Compliance</i>	246
a.	<i>Mediator-Drafted Opinions Requiring Court Consideration</i>	246
b.	<i>Establishment of a Sanctions Committee to Deter Non-Compliance</i>	248
3.	<i>UNICEF as an Ideal Body for Selecting International Mediators</i>	249
4.	<i>Selection Standards and Training of International Mediators</i>	252
5.	<i>Illustration of the Proposed International Mediation Process</i>	256
6.	<i>Overarching Question: An Amendment to the Convention?</i>	257
V.	<i>CONCLUSION</i>	259

A child is born in the United States (“U.S.”) to a recently wed U.S. citizen father and Japanese mother. The parents live happily for several years, but begin to experience irreconcilable differences in their marriage and ultimately seek a divorce. In the dissolution proceedings, the judge orders joint custody of the child. A few years later, to the father’s dismay, he receives an international phone call from the mother informing him that her “visit” to Japan with the child would be perpetual and that she does not intend to return to the U.S. with the child. The mother subsequently appears before a Japanese court, where she obtains an order granting her sole custody. Although the father has a conflicting American court order assigning him valid custody rights, that order is not recognized by the Japanese judge. Just like that, the father’s life has taken a turn for the worst as he realizes that his child is six-thousand miles away and there may be nothing he can do about it.

Meanwhile, in Japan, hope is on the horizon for a new family as a Japanese man and an American woman get married and welcome a child of their own. Unfortunately, after several years, the marriage begins to crumble. When divorce proceedings are initiated, the mother and father decide to keep the custody issue out of court because they are aware of Japanese courts’ tendency to designate sole custody to one parent. They do not wish to risk uncertainty regarding who will receive legal custody of the child. Instead, the parents make an agreement to share decision-making authority with regard to the child. As it turns out, the mother had secretly intended all along to take the child back to the U.S. and create a permanent home there. Upon the mother’s petition, an American court grants her sole custody of the child without any consideration of the potential rights of the father in Japan. The father soon realizes that his

child may be gone forever. As he gazes into the night sky, he wonders helplessly what his child is doing at that exact moment. Meanwhile, six-thousand miles away, another left-behind father solemnly watches the sunrise, contemplating the same of his own child. In the end, international parental child abduction shattered not one, but two, parental bonds, leaving a pair of broken hearts and empty souls on opposite ends of the world.

The above example illustrates the importance of a major goal in the realm of international child abduction: to prevent parents from taking their children across national borders to seek favorable custody rulings from sympathetic courts that are not obliged to consider the conflicting rights of left-behind parents. The Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”) is a multilateral treaty that was enacted to achieve that purpose. However, as discussed below, the Convention has its shortcomings and the need for a more equitable consideration of the interests of children remains.

I. BACKGROUND

The Convention concluded on October 25, 1980.¹ As of September 2014, ninety-three countries are Members of the Convention,² which recognizes that in custody arrangements, the children’s interests are of utmost importance.³ As such, the Convention has two explicit aims: “(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and access

1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98 (entered into force Dec. 1, 1983) [hereinafter Convention]. The Convention is a non-self-executing treaty, meaning that domestic legislation is required to implement it into force in a State’s domestic law. D. MARIANNE BLAIR, et. al, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 432 (2d ed. 2009).

2. HAGUE CONFERENCE ON PRIVATE INT’L LAW, STATUS TABLE UNDER THE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 [hereinafter STATUS TABLE]. Each country became a Member of the Convention either by ratification, accession, or succession, and subsequently entered it into force. *Id.* In China, however, the Convention applies only in Hong Kong and Macao. *Id.* (follow the “View and/or print full status report” hyperlink; then follow the letter “C” hyperlink next to the “People’s Republic of China.”)

3. The opening sentence of the Convention provides: “The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody. . . .” Convention, *supra* note 1.

under the law of one Contracting State are effectively respected in the other Contracting States.”⁴ Removal or retention of a child is “wrongful” where it amounts to a “breach of rights of custody” belonging to someone “under the law of the State in which the child was habitually resident”⁵ immediately before the removal or retention,” where those custody rights were in fact exercised, or would have been exercised, but for the child’s removal or retention.⁶

Although the goals of the Convention are seemingly straightforward, achieving them in practice is more problematic, particularly in light of the Article 12 and Article 13 exceptions to the general rule requiring the prompt return of a child to his or her State of habitual residence.⁷ Article 12 requires the return of a wrongfully removed or retained child where judicial or administrative proceedings commence within one year after the date on which the child was removed or retained.⁸ If more than one year passes before the commencement of such proceedings, the return of the child is likewise required, “*unless it is demonstrated that the child is now settled in its new environment.*”⁹ Notwithstanding the specifications of Article 12, Article 13(b) states that the return of the child is not required if one who opposes the child’s return affirmatively shows that “*there is a grave risk that [the] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*”¹⁰

Several provisions of the Convention provide that judicial and administrative authorities are not to equate their decisions under the

4. Convention, *supra* note 1, at art. 1.

5. *Id.* The Convention does not define “habitual residence,” as the term is meant to be fluid. *Id.* In the U.S., the “habitual residence” is presumed to be the particular State where the child lived prior to being abducted. Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?*, 2 IND. J. GLOBAL LEGAL STUD. 553, 558 (1994). Courts have split on the issue of whether “habitual residence” is properly determined by the subjective intentions of the parties or objective indicators (e.g., the child’s adaption to the new environment). Tai Vivatvaraphol, *Back To Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3325 (2009).

6. Convention, *supra* note 1, at art. 3. Article III of the Convention also states that rights of custody may arise either by operation of law, judicial or administrative order, or the existence of an agreement having legal effect under the laws of the State of habitual residence. *Id.*

7. *Id.* at arts. 12–13.

8. *Id.* at art. 12.

9. *Id.* (emphasis added).

10. *Id.* at art. 13(b) (emphasis added). Also, Article 20 codifies a rarely invoked, but potentially significant exception, providing that a child need not be returned if “the fundamental principles of the requested State relating to the protecting of human rights and fundamental freedoms” would not allow for the return. *Id.* at art. 20.

Convention with the merits of the underlying custody arrangement.¹¹ American courts have interpreted that language to imply that the courts of an abducted-to nation lack jurisdiction to decide the merits of underlying custody disputes; instead, custody determinations are properly left to the courts of the country of “habitual residence.”¹² One rationale for that interpretation is that preserving the status quo of prior custody arrangements will deter parents from removing children across international borders to seek more sympathetic courts.¹³ This principle is consistent with the spirit of the Convention.¹⁴

II. THE UNITED STATES VERSUS JAPAN AS MEMBER STATES TO THE CONVENTION

The U.S. ratified the Convention on July 1, 1988.¹⁵ To implement the Convention into domestic law, the U.S. enacted the International Child Abduction Remedies Act (“ICARA”).¹⁶ The U.S. government then promulgated rules to help implement ICARA.¹⁷ Pursuant to ICARA, Convention actions may be heard in either state or federal courts.¹⁸ The requisite burden of proof for a successful Article 13(b) defense is “clear and convincing evidence,” whereas other exceptions enumerated in Article 12 or Article 13 only require a “preponderance of the evidence.”¹⁹

11. These provisions include Articles 16, 17, and 19. For instance, Article 19 states, “a decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.” *Id.* at art. 19; *see also id.* at arts. 16–17.

12. *See, e.g.,* Friedrich v. Friedrich, 78 F.3d 1060, 1063–64 (6th Cir. 1996).

13. *Id.* at 1064.

14. *See generally* Convention, *supra* note 1 (expressing the desire to prevent the wrongful removal or retention of children internationally on the assumption that such removal or retention would harmfully impact them).

15. STATUS TABLE, *supra* note 2.

16. International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11601 (2012) [hereinafter ICARA].

17. HAGUE CONFERENCE ON PRIVATE INT’L LAW, U.S. COUNTRY PROFILE UNDER THE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, *available at* http://www.hcch.net/upload/abduct2012cp_us.pdf [hereinafter U.S. COUNTRY PROFILE]. The rules are codified in the Code of Federal Regulations. *See* 22 C.F.R. §§ 94.1–94.8 (2014).

18. Michael R. Walsh & Susan W. Savard, *International Child Abduction & the Hague Convention*, 6 BARRY L. REV. 29, 49–50 (2006).

19. *Id.* Proving the Article 20 “human rights and fundamental freedoms” exception requires “clear and convincing evidence.” *Id.*

Subsequently, most American states adopted the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).²⁰ Consistent with the international Convention, the UCCJEA allows for the “recognition and enforcement” of foreign child custody and visitation orders.²¹ The UCCJEA serves to ensure that prior custody determinations complied with due process and equal protection principles.²²

After the Convention entered into force in the U.S., the U.S. State Department began issuing annual reports indicating which Member States were non-compliant in returning children there pursuant to the Convention.²³ For example, the most recent report, issued in April 2014, indicated that Costa Rica, Guatemala, and Honduras were “not compliant.”²⁴ Additionally, the Bahamas and Brazil were labeled as having demonstrated “patterns of non-compliance.”²⁵

One country that some suspect might exhibit similar patterns of non-compliance, now that it has ratified the Convention, is Japan.²⁶ On May

20. See U.S. COUNTRY PROFILE, *supra* note 17; Unif. Child Custody and Enforcement Act 9(1A) U.L.A. 657 (1997), available at http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf.

21. According to the U.S., “In general, the [UCCJEA] provides a mechanism for the recognition and enforcement of foreign custody orders by U.S. state courts, if the foreign proceeding was done in substantial conformity with the provisions of the UCCJEA governing due process. Additionally, within the United States, each U.S. state must give full faith and credit to a civil protection order granted by another U.S. state. Thus, we believe the current trend in the United States is for courts to recognize foreign orders of protection or, where the order cannot be recognized directly, create a mirror order.” U.S. COUNTRY PROFILE, *supra* note 17.

22. *Id.*

23. See U.S. DEP’T OF STATE: BUREAU OF CONSULATE AFFAIRS, COMPLIANCE INFORMATION, <http://travel.state.gov/content/childabduction/english/legal/compliance.html>, for a collection of the reports. Mexico has been labeled as non-compliant or displaying patterns of non-compliance every year since 1999. *Id.* One country that has also been particularly problematic is Brazil, as evidenced by the 2008–2013 reports, all indicating that Brazil either demonstrated patterns of non-compliance or was non-compliant. *Id.* The U.S. had returned seven abducted children to Brazil pursuant to the Convention by 2010, but Brazil did not send a single child back to the U.S. in a Convention proceeding until the infamous case of a child named Sean Goldman in 2009, where international pressure and threatened economic sanctions may have been the true cause of the decision. See Amanda Michelle Waide, *To Comply or Not to Comply? Brazil’s Relationship with the Hague Convention on the Civil Aspects of International Child Abduction*, 39 GA. J. INT’L & COMP. L. 271, 295 (2010).

24. U.S. DEP’T OF STATE: BUREAU OF CONSULATE AFFAIRS, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2014), <http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf> [hereinafter 2014 REPORT ON COMPLIANCE].

25. *Id.* The reasons for these particular States’ non-compliance will be discussed below in further detail.

26. See Colin P.A. Jones, *Hague Convention on Child Abduction May Shape Japan’s Family Law*, THE JAPAN TIMES (June 11, 2013), <http://www.japantimes.co.jp/community/>

22, 2013, Japan solidified its intention to become a member to the Convention by statutorily joining the treaty.²⁷ Japan enacted the necessary legislation to implement the Convention into domestic law on June 12, 2013.²⁸ The Japanese government approved the promulgation of the Convention on January 24, 2014, which then entered into force on April 1, 2014.²⁹ Japan's initial hesitation to becoming a signatory to the Convention is partially rooted in its domestic family law system, which is inconsistent with the goals and principles underlying the Convention.³⁰ Another related factor is its claim that it needs to protect Japanese mothers fleeing from domestic violence.³¹ These and other reasons, to be discussed in further detail below, raise suspicion that Japanese courts may not fully comply with the Convention or might inaccurately interpret its exceptions.

III. THE PROBLEM OF NATIONALISTIC BIAS AND STRATEGIC INTERPRETATION

The U.S. is a relatively old member of the Convention and frequently upholds the treaty's core principles by narrowly interpreting its exceptions.³² Contrarily, Japan is the newest signatory to the Convention and has already provided several reasons to give other Member States concern over its bona fide compliance.³³ The basic problem is that the vague language of the Article 12 and Article 13 exceptions allows Member States to interject subjective bias into the enforcement process and evade the Convention's principles, rendering the treaty's application inconsistent. Although the U.S. often upholds the principles of the Convention by returning children to their State of habitual residence, its courts have

2013/06/11/issues/hague-convention-on-child-abduction-may-shape-japans-family-law-or-vice-versa/#.VAfF-PldXX5.

27. *Overview of the Hague Convention and Related Japanese Legal Systems*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (June 2, 2014), http://www.mofa.go.jp/fp/hr_ha/page22e_000250.html.

28. *Id.*

29. *Id.*

30. See Megan J. Reynolds, *It Can Be Done: On Japan Becoming a Successful Signatory to the Hague Convention on Civil Aspects of International Child Abduction*, 44 GEO. WASH. INT'L L. REV. 367, 379–81 (2012).

31. *Id.* at 386–87.

32. See, e.g., Friedrich, 78 F.3d at 1069; *Renovales v. Roosa*, No. FA 91 0392232 S, 1991 WL 204483, at *6 (Conn. Super. Ct. Sept. 27, 1991); *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000); *McManus v. McManus*, 354 F. Supp. 2d 62, 69 (D. Mass. 2005).

33. See Jones, *supra* note 26.

engaged in liberal interpretations of the Article 12 and 13 exceptions and, at times, interjected nationalistic bias into the process.³⁴ The risk of subjective interpretation is particularly great with regard to the Article 13(b) defense, which is problematic because such defenses have been on the rise globally and have remained the most common reason for a court to refuse a child's return.³⁵

As for Japan, its domestic family law system seems to conflict with the Convention's principles. For instance, its failure to recognize joint custody³⁶ may often hinder, rather than further, the interests of children. Moreover, its bias in favor of preserving maternal custody and Japanese heritage³⁷ may influence courts to avoid prompt return in many situations. Japan's hesitance to ratify the Convention and its willingness to act as a safe haven for Japanese mothers³⁸ also suggest that Japan may apply the exceptions in an overly broad manner and, consequently, may not honor foreign court judgments to compel child removal.

This problem of interpretation and judicial bias towards one's own country is not easily solved. Several possible solutions exist, such as amending the Convention to narrow the language of the exceptions, providing effective economic sanctions against non-compliant Member States, or simply resorting to regional agreements rather than international ones. However, current signatories would likely resist narrowing the language of the exceptions; the current broad language is favored because it provides a measure of discretion that expands the range of justifications available to courts in denying a child's return.³⁹ As to

34. See, e.g., *Krishna v. Krishna*, No. C 97-0021 SC, 1997 WL 195439, at *4 (N.D. Cal. Apr. 11, 1997) ("It is clear from the evidence that the relationship between Mr. and Ms. Krishna is a tempestuous one, which has caused considerable psychological stress to both parents and child. Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly because Ms. Krishna has relatively limited familial support in Australia. Moreover, the child is currently well settled in United States where a divorce proceeding has been filed and can be expedited to minimize the costs to Mr. Krishna").

35. NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *LITIGATING INT'L CHILD ABDUCTION CASES UNDER THE CONVENTION* 53 (2012) [hereinafter *LITIGATING INT'L CHILD ABDUCTION CASES*]; HAGUE CONFERENCE ON PRIVATE INT'L LAW, *STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PART I – GLOBAL REPORT* ¶¶ 107-109 (2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.

36. Reynolds, *supra* note 30, at 380–81; Jennifer Costa, *If Japan Signs the Hague Convention on Civil Aspects of International Child Abduction: Real Change or Political Maneuvering?*, 12 OR. REV. INT'L L. 369, 376 (2010).

37. Reynolds, *supra* note 30, at 382–84.

38. See *id.* at 386–87; Costa, *supra* note 36, at 371.

39. Consider that, in 2013, return was denied in fifty-seven Convention proceedings worldwide, while return was ordered in one-hundred-four such proceedings. U.S. DEP'T

sanctions, they tend to create hostility and may not address the problem on a global level.⁴⁰ In light of these considerations, the most effective and enduring solution is a system where some degree of neutrality can be achieved internationally and where all affected parties have the opportunity to participate in structuring the result that will legally bind them in the future.

A. The Problem of Exception Over-Breadth

1. U.S. Judicial Interpretation of the Article 13(b)

The American interpretation of Convention Article 13(b) is not easily ascertainable because U.S. courts have applied a wide variety of approaches in different circumstances.⁴¹ Overall, however, U.S. courts have most often applied the exception narrowly.⁴² For instance, in the frequently cited case of *Friedrich v. Friedrich*, the Sixth Circuit held that the Article 13(b) “grave risk of harm” exception does not allow courts in the country to which the child was taken to engage in speculation on where the “child would be happiest.”⁴³ Rather, the exception can be properly applied only in two situations: (1) where the child is at risk of imminent danger if returned (meaning the child will be returned to circumstances of famine, disease, or war); or (2) where “serious neglect, abuse, or extreme emotional dependence” of the child is implicated if returned.⁴⁴ In either scenario, for the defense to be properly invoked, the courts in the State of habitual residence must also be unable or unwilling to adequately protect the child.⁴⁵ A circuit split exists among U.S. federal courts as to whether the

OF STATE: BUREAU OF CONSULATE AFFAIRS, OUTGOING AND INCOMING CASE CLOSINGS STATISTICS (2013), available at <http://travel.state.gov/content/dam/childabduction/statistics/CY2013%20-%20Incoming%20and%20Outgoing%20Closing%20Statistics.pdf>. Although the Convention seems to be working more often than not, these statistics tend to show that Member States are still denying return fairly often in cases in which they are supposedly applying the Convention. See *id.*

40. For instance, economic sanctions may adversely affect vulnerable populations, such as in third world countries. This may spark humanitarian concerns among the international community. See *UN Security Council Sanctions Committees*, UNITED NATIONS, <http://www.un.org/sc/committees>.

41. Compare *Friedrich*, 78 F.3d at 1069, with *Krishna*, 1997 WL 195439, at *4.

42. See *Friedrich*, 78 F.3d at 1069; *Roosa*, 1991 WL 204483, at *6; *Walsh*, 221 F.3d at 218; *McManus*, 354 F. Supp. 2d at 69.

43. *Friedrich*, 78 F.3d at 1068.

44. *Id.* at 1069.

45. See *id.*

Article 13(b) requires imminent danger or, alternatively, whether how far in the future the alleged harm would occur is irrelevant.⁴⁶

If the court in the country that the child is being returned to—the State of habitual residence—can adequately remedy the situation, then the Article 13(b) exception generally does not apply.⁴⁷ Nonetheless, in 2008, the Eleventh Circuit determined that an analysis of whether the State of habitual residence can provide adequate protection is problematic.⁴⁸ The court ultimately held that the responding party had no duty to show the inability or unwillingness of the country of habitual residence to adequately protect the child in order to establish that a “grave risk of harm” would result upon the child’s return.⁴⁹

American courts generally refuse to grant exceptions to the Convention as substitutes for the perceived best interests of the child.⁵⁰ For instance, in *Renovales v. Roosa*, a mother took her children from their habitual residence in Spain to Connecticut, breaching the father’s custody rights, in violation of the Convention.⁵¹ The mother invoked the Article 13(b) “grave risk of harm” defense, alleging that one of the children suffered from post-traumatic stress disorder (“PTSD”) at least partially due to the father’s controlling and hostile behavior, including force-feeding, screaming at, and humiliating the child.⁵² The Connecticut Superior Court refused to apply the exception, finding evidence of nothing more than “cultural differences in family child rearing.”⁵³ Consequently, the court ordered that the child be immediately returned to Spain and held the mother liable for both travel expenses and attorney’s fees.⁵⁴

However, U.S. courts have refused to return a child pursuant to the Convention in cases where there is concrete evidence of past physical abuse by the parent to whom the child would be returned.⁵⁵ For example, in *Danaipour v. McLarey*, the First Circuit refused to send two sisters back to their habitual residence in Sweden after the district court found that the father sexually abused one of them.⁵⁶ The court affirmed the district court’s conclusion that a finding of sexual abuse of one daughter,

46. Compare *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005), with *Walsh*, 221 F.3d at 218.

47. See *Friedrich*, 78 F.3d at 1069.

48. *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008).

49. *Id.*

50. See, e.g., *Roosa*, 1991 WL 204483, at *5.

51. *Id.* at *1.

52. *Id.* at *3–4.

53. *Id.* at *5.

54. *Id.* at *6.

55. See, e.g., *Danaipour v. McLarey*, 386 F.3d 289, 304 (1st Cir. 2004).

56. *Id.*

combined with the resulting psychological harm to both daughters, was sufficient to invoke the Article 13(b) defense.⁵⁷ On the other hand, a Massachusetts district court reached the opposite conclusion in *McManus v. McManus*, where a mother seeking return of her children to Northern Ireland faced an Article 13(b) defense on account of her harsh physical discipline of the children, including striking them at least six times and engaging her brother and friend to assist in physically disciplining them twice.⁵⁸ The court admitted that there was reason to believe that the children would experience some degree of psychological harm if returned to their mother's care in Northern Ireland and even characterized the harm as "serious."⁵⁹ However, the court observed that cases successfully invoking the Article 13(b) defense in the past required evidence of a continuing pattern of physical abuse, a high propensity for violence, or both.⁶⁰ Conversely, "evidence of real but sporadic or isolated incidents of physical abuse" had been insufficient to invoke the exception.⁶¹ Hence, despite the children's objection to return, the court found the facts insufficient for an Article 13(b) defense.⁶²

A more recent Seventh Circuit decision, *Van de Sande v. Van de Sande*, held that the magnitude of the potential harm, and thus an assessment of the nature of the harm, is a proper consideration in addition to the mere likelihood that the harm will take place if the child is returned.⁶³ That case involved two children whose State of habitual residence was Belgium.⁶⁴ The mother was living in the U.S. with the two children when the father was awarded custody by a Belgian court, thus rendering the mother an "abductor."⁶⁵ At trial, the mother presented several affidavits alleging that the father abused her multiple times per week, including choking her, pushing her down the stairs, kicking her at least once while she was pregnant, and threatening to kill her and the children.⁶⁶ The wife also alleged that the father had used harsh physical punishment on the daughter

57. *Id.* at 302–03. It appears that sexual abuse is a bright line qualifier for Article 13(b) refusal of return. *See id.*

58. *McManus*, 354 F. Supp. 2d at 65, 70.

59. *Id.* at 65.

60. *Id.* at 70.

61. *Id.*

62. *Id.*

63. *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

64. *Id.* at 569.

65. *Id.*

66. *Id.*

in the past.⁶⁷ The Seventh Circuit concluded that “given [the father’s] propensity for violence, and the grotesque disregard for the children’s welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence, it would be irresponsible to think the risk to the children less than grave.”⁶⁸ The court, noting the sufficiency of the evidence of grave risk of harm and the questionable post-return conditions in Belgium, remanded for an evidentiary hearing to explore those issues.⁶⁹

By the same token, U.S. courts are more reluctant to invoke the Article 13(b) defense based on physical abuse where there are only bare allegations as opposed to concrete evidence.⁷⁰ For instance, in *Munoz v. Ramirez*, despite the father’s allegations that his daughter was sexually abused by her mother’s boyfriend, the court refused to invoke the “grave risk of harm” defense because there was “no actual evidence” indicating that the mother’s boyfriend had a history of child molestation or that he inappropriately touched the daughter.⁷¹

Some courts alternatively considered a series of factors in the physical abuse context to determine whether the “grave risk of harm” is sufficient to invoke the Article 13(b) defense.⁷² An illustrative example is *Simcox v. Simcox*, where the court considered the nature of the abuse, the frequency with which the abuse occurred, and the probability that it would happen again without adequate protection.⁷³ In that case, the mother sought to prevent her children’s return to their father in their State of habitual residence, presenting evidence that he repeatedly beat them, hit them with a belt, pulled their hair and ears, had angry outbursts, and abused the

67. *Id.*

68. *Id.* at 570.

69. *Id.* at 572. *But see* Koch v. Koch, 450 F.3d 703, 719 (7th Cir. 2006) (ordering the children’s return to their State of habitual residence in Germany where the father abducted the children to the U.S. and displayed a similar pattern of abuse and threats toward the mother, but on the sole basis that Germany was the habitual residence rather than on Article 13(b) grounds, as the Article 13(b) defense was not raised).

70. *Munoz v. Ramirez*, 923 F. Supp. 2d 931, 955 (W.D. Tex. 2013); *see also* Jaet v. Siso, No. 08–81232–CIV, 2009 WL 35270, at *7–8 (S.D. Fla. 2009) (holding that physically disciplining the child, while concerning, was insufficient to invoke the Article 13(b) defense because there was no evidence of child abuse beyond that purpose, and the discipline could be partially accounted for by cultural differences in child upbringing, a matter inappropriate for court interference); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850–51 (Ky. Ct. App. 1999) (refusing to invoke the Article 13(b) exception where the mother offered a psychologist’s testimony indicating that the child had PTSD and probably suffered from sexual, physical, and emotional abuse as well as child neglect, in the absence of evidence that the father actually abused the child).

71. *Munoz*, 923 F. Supp. 2d at 955.

72. *See, e.g., Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007).

73. *Id.* at 608.

mother in their presence.⁷⁴ Because the nature of the harm was “serious,” occurred with “extreme frequency,” and was reasonably likely to happen again without protection, the court concluded that the mother established her burden of proving a grave risk of harm by clear and convincing evidence.⁷⁵

It is relatively common for U.S. courts interpreting Article 13(b) of the Convention to require proof of specificity.⁷⁶ For instance, successfully opposing a child’s return typically requires showing the specific potential harm that will be endured by that child, not someone else.⁷⁷ However, some courts have applied a more liberal standard of proof in determining whether the alleged harm would affect a specific child as opposed to a parent or someone else.⁷⁸ For example, in *In re Krishna v. Krishna*, the mother took the child from Australia to the U.S. in violation of the Convention.⁷⁹ She later raised an Article 13(b) defense alleging that the father physically abused her, but never the child, in the past.⁸⁰ The court held that the mother could properly invoke the defense because although physical harm was unlikely, there was “compelling evidence establishing the potential for serious psychological harm” in light of the history of alleged abuse and the hostile relationship between the parents.⁸¹

Several past decisions in U.S. courts indicate a willingness to consider the fact that a child is settled into his or her new environment in deciding whether a “grave risk of harm” is sufficiently grave to deny the return of

74. *Id.*

75. *Id.* at 609.

76. *See, e.g.*, Friedrich, 78 F.3d at 1067–68.

77. *See id.*

78. *See, e.g.*, Krishna, 1997 WL 195439, at *4.

79. *Id.* at *1.

80. *Id.*

81. *Id.* at *1, *4. This liberal standard appears to be out of line with American courts’ general approach. *See* Croll v. Croll, 66 F. Supp. 2d 555, 561 (S.D.N.Y. 1999) (“The cases applying the Hague Convention make manifest that the Article 13 exception is only applicable when the child, as opposed to a parent, would be placed in danger if she were returned”).

the child.⁸² However, mere adjustment problems are generally inadequate.⁸³ Presumably, then, most American courts in the Article 13(b) context would not be swayed by arguments that the child being returned would have to bear the burden of attending a new school, meeting new friends, or learning a new language.⁸⁴

At least one U.S. court has considered the potential effect that separation from his or her parent(s) would have on the child.⁸⁵ However, in light of inconsistent precedents, it remains unclear whether a court today would consider a strong parent-child bond sufficient to invoke the Article 13(b) defense or, alternatively, whether it would leave resolution of the issue to the courts of the child's State of habitual residence.⁸⁶ While some courts have determined that it is appropriate to weigh a child's objection to being returned in evaluating the Article 13(b) "grave risk of harm" defense,⁸⁷ others have rejected such an approach.⁸⁸

82. See *Blondin v. Dubois*, 238 F.3d 153, 153 (2d Cir. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1059 (E.D. Wash. 2001). Those courts appear to be fusing the Article 12 "settled into new environment" exception and the 13(b) "grave risk of harm" exception into one. See *id.* However, there is no indication in the language of the Convention that how well a child is settled in his or her new environment (Article 12) has anything to do with establishing a "grave risk of harm" for Article 13(b) purposes. See Convention, *supra* note 1, at arts. 12, 13(b).

83. See *Morrison v. Dietz*, Civil Action No. 07-1398, 2008 WL 4280030, at *13 (W.D. La. 2008), *aff'd on other grounds*, 349 F. App'x 930 (5th Cir. 2009); *Friedrich*, 78 F.3d at 1068 ("Under the logic of the Convention, it is the *abduction* that causes the pangs of the subsequent return").

84. The "habitual residence" dynamic should reduce the raising of such arguments because children are returned to the State where they originally lived before the abduction. However, in some cases, the child may be present in the abducted-to nation for long enough to establish a comfortable life there, inclusive of school, friends, and culture. As a result, the child may face adaptation-related problems upon return.

85. See *Tsarbopoulos*, 176 F. Supp. 2d at 1061-62 (refusing to return the children to their habitual residence in Greece where the mother was one child's primary caregiver for nearly his entire life, that child had a strong bond with his siblings, and the mother could not return to Greece due to inadequate resources). *But see* *Charalambous v. Charalambous*, 627 F.3d 462, 469-70 (1st Cir. 2010) (holding that the effect on the child of separation from the mother is an issue properly left to the courts of the State of habitual residence); *Jaet*, 2009 WL 35270, at *8 (holding that although the children were so attached to their mother that separation would probably result in severe psychological harm, the Article 13(b) defense failed due to the absence of legal authority compelling a return under the particular facts of the case).

86. Case law is inconsistent on this issue. Compare *Tsarbopoulos*, 176 F. Supp. 2d at 1061-62, with *Charalambous*, 627 F.3d at 469-70, and *Siso*, 2009 WL 35270, at *8.

87. See, e.g., *Kofler v. Kofler*, Civil No. 07-5040, 2007 WL 2081712, at *8-9 (W.D. Ark. 2007).

88. See, e.g., *Kufner v. Kufner*, 480 F. Supp. 2d 491, 512-13 (D.R.I. 2007) (refusing to consider children's inconsistent wishes in assessing "grave risk of harm" because of the possibility that their parents unduly influenced them, especially considering the children's youth and immaturity).

As for the “grave risk that [the] return would . . . otherwise place the child in an intolerable situation,”⁸⁹ the court in *Mendez Lynch v. Mendez Lynch* concluded that a country’s “civil stability” was insufficient.⁹⁰ Although Argentina, the State of habitual residence in that case, was experiencing extremely difficult financial times and government chaos, the court determined that the circumstances of return were nonetheless tolerable because the neighborhoods and schools surrounding the child’s prospective home were not dangerously affected.⁹¹ In such situations, where the perceived harm is more likely to affect the general population as opposed to a particular child, courts have considered at least three additional factors in evaluating whether a “grave risk of harm” exists: (1) whether terrorist attacks or other violent activities substantially disrupted life in the State of habitual residence;⁹² (2) whether, prior to the abduction, the child faced the harm complained of and the parents failed to act to remove the child from the situation;⁹³ and (3) whether mitigating measures exist.⁹⁴

In sum, the clear disjunction among U.S. courts in evaluating Article 13(b) defense claims illuminates the broader problem of inconsistent interpretations of the Convention’s exceptions. Surely, if courts within a single country arrive at such varied conclusions about how and when to apply the Article 13(b) exception, uniformity at the international level is virtually unattainable. Indeed, internationally, courts exhibit stark inconsistency.⁹⁵

89. Convention, *supra* note 1, at art. 13(b) (emphasis added).

90. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364–65 (M.D. Fla. 2002).

91. *Id.*

92. *See* *Frier v. Frier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996).

93. *See* *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002).

94. *See* *Walsh*, 221 F.3d at 218.

95. For instance, as previously noted, Brazil has been reported as demonstrating patterns of non-compliance with the Convention in recent years. In 2009, the U.S. State Department reported that Brazil had a tendency to treat Convention cases as custody determinations and deny applications for return based on the fact that the child in question had either become settled in his or her environment or adapted to the culture in Brazil, or both. *See* COMPLIANCE INFORMATION, *supra* note 23. These justifications are generally inconsistent with U.S. judicial interpretations the Convention. *See* *Freidrich*, 78 F.3d at 1069; *Charalambous*, 627 F.3d at 469–70; *Jaet*, 2009 WL 35270, at *8.

2. Japan's Prospective Interpretation of the Article 13(b) Exception

Japan only very recently gained official Convention signatory status, thus it is not surprising that, among the estimated 300 children abducted there from the U.S. between 1994 and 2013, the U.S. government—as of 2013—did not know of a single example of a Japanese court granting favorable relief to a left-behind, American parent.⁹⁶ In 2009, an estimated 10,000 children in Japan were denied a relationship with their non-Japanese parent after a separation or divorce.⁹⁷ That same year, U.S. citizens were involved in approximately 80 cases of international parental child abduction to Japan.⁹⁸ Moreover, between 2007 and 2009, the number of cases of parental kidnapping in Japan practically doubled.⁹⁹ In 2011, there were 100 active cases of child abduction or wrongful retention of American children in Japan, involving a total of 140 children.¹⁰⁰

In light of these statistics, the U.S. and several other nations ultimately resorted to international pressure to secure Japan's ratification of the Convention. However, it is unclear that Japan will now comply with the Convention. There are multiple reasons to suspect that Japan will demonstrate the same tendency as many current Member States: to interpret the Convention's exceptions—particularly Article 13(b)—in an overly broad and inherently biased manner. As stated above, Japanese domestic family law strongly disfavors joint custody¹⁰¹ and thus conflicts with the Convention's principles regarding custody rights and the interests of children. Further, Japanese courts often exhibit bias in favor of mothers or preserving Japanese heritage,¹⁰² which their future Convention decisions may wrongfully reflect. Finally, Japan seeks to protect female citizens returning there to escape domestic violence,¹⁰³ which raises some concern that its courts will interpret the Article 13(b) exception too broadly.

96. H. Rep. Chris Smith, Remarks at the 2172 Rayburn House Office Building: Resolving International Parental Child Abductions to Non-Hague Convention Countries (May 9, 2013), *available at* http://chrissmith.house.gov/uploadedfiles/2013-05-09_chairman_smith_on_resolving_international_parental_child_abductions_to_non-hague_convention_countries_on_letterhead.pdf; Reynolds, *supra* note 30, at 367–68.

97. Justin McCurry, *Savoie's Choice: Abduct or Fight?*, GLOBAL POST (Oct. 27, 2009, 6:45 AM), <http://www.globalpost.com/dispatch/japan/091026/child-abductions-japan>.

98. *Id.*

99. Michelle Boykin, *A Comparison of Japanese and Moroccan Approaches in Adopting the Hague Convention on the Civil Aspects of International Child Abduction*, 46 FAM. L.Q. 451, 455 (2012).

100. *Id.*; Reynolds, *supra* note 30, at 378.

101. Reynolds, *supra* note 30, at 380; Costa, *supra* note 36, at 376.

102. Reynolds, *supra* note 30, at 382–84.

103. *Id.* at 386–87; Costa, *supra* note 36, at 371.

a. Japanese Domestic Family Law and Family Court System

First of all, Japanese domestic law does not closely align with the Convention's stated principles.¹⁰⁴ Family law in Japan is based on the "koseki" system.¹⁰⁵ Upon marriage, every couple obtains a household registry (or a "koseki") that establishes the legal status of the family and governs the relationships of the family unit.¹⁰⁶ If a husband and wife divorce, the system provides that any children of the marriage are assigned exclusively to one side of the family or the other.¹⁰⁷ Unlike most Member States' legal systems, the Japanese system "simply has no mechanism for sharing children between two families."¹⁰⁸

Similarly, under Japan's Civil Code, there are two types of child custody: "shinken" and "kangoken."¹⁰⁹ While "shinken" can be fairly equated with legal custody, "kangoken" approximates physical custody.¹¹⁰ Both parents exercise "shinken," of which "kangoken" is a component, over their minor children so long as the parents are married.¹¹¹ However, if they divorce, "shinken" and "kangoken" are almost certain to remain together and be awarded to one parent, effectively limiting the exercise of legal parental authority to that parent only.¹¹² A parent who earns sole custody in Japan essentially obtains "exclusive decision making authority over all aspects of the child's life, including where the child will live and go to school and

104. See Reynolds, *supra* note 30, at 380; Costa, *supra* note 36, at 376; Jane Kitagawa, *Left Behind: Parents Challenge Japan's Dismal Child Abduction Laws*, METROPOLIS (Jan. 23, 2014), available at <http://www.internationalfamilylawfirm.com/2014/01/left-behind-parents-challenge-japans.html> ("[Japan's] divorce figures may be consistent with rates worldwide, but Japan is unique in that child abduction after separation or divorce is legal according to its family court." As for Japan's ratification of the Convention, "[t]here are also doubts among left-behind parents, lawyers and others alike that not much will change unless domestic laws are also addressed"). *Id.*

105. Reynolds, *supra* note 30, at 379–80.

106. *Id.* at 380.

107. *Id.*

108. G. M. Filisko, *When Global Families Fail*, A.B.A. J. (July 1, 2010), http://www.abajournal.com/magazine/article/when_global_families_fail/.

109. Reynolds, *supra* note 30, at 380.

110. *Id.*

111. *Id.*

112. *Id.* at 380–81; Colin P.A. Jones, *Towards an "Asian" Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention* 11 (Asian Law Inst., Working Paper No. 031, 2013), available at <http://law.nus.edu.sg/asli/pdf/WPS031.pdf>.

even whether the other parent will be excluded from their life.”¹¹³ Not only are joint and partial custody arrangements not legally recognized in Japan,¹¹⁴ but courts award sole custody to the mother at the expense of the father about 80% of the time.¹¹⁵ Although there is evidence suggesting the public attitude in Japan regarding family law and the best interests of the child may be changing in favor of joint post-divorce parental involvement,¹¹⁶ there is no practical way to infuse those values within the judiciary.¹¹⁷ Further, the judiciary has shown no signs of such adaptation thus far.¹¹⁸ The Japanese court system may also present some difficulties; most family law in Japan is created judicially rather than statutorily, thus it is very unlikely for a foreign parent, even with proof of a pre-existing custody order, to receive a favorable ruling from a Japanese judge.¹¹⁹

113. Jones, *supra* note 112, at 11.

114. Reynolds, *supra* note 30, at 380.

115. Kamoto Itsuku, *Behind Japan's Ratification of the Hague Abduction Convention*, NIPPON.COM (June 14, 2013), <http://www.nippon.com/en/currents/d00079/>.

116. See Reynolds, *supra* note 30, at 386; *Lawmakers Launch Group to Ensure Visitations After Divorce*, KYODO NEWS INTERNATIONAL (Mar. 18, 2014), <http://www.globalpost.com/dispatch/news/kyodo-news-international/140318/lawmakers-launch-group-ensure-visitations-after-divorc> (reporting that Japanese lawmakers arranged a meeting with the goal of enacting legislation to improve post-divorce visitation rights between children and parents).

117. Reynolds, *supra* note 30, at 382.

118. *Id.*

119. *Id.* at 381. Another potential concern is that Japanese family court orders are known for their general lack of enforceability due to judicial discretion to not enforce judgments, among other limitations. *Id.* at 381–82; see also Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 ASIAN-PAC. L. & POL'Y J. 166, 177 (2007) (noting that Japanese judges have “no court marshals with police-like powers to carry out their orders,” and have limited ability to hold parties in contempt of court). Even in the limited situations in which judges have enforcement mechanisms available to them, they “may not care whether this result is achieved” and often take advantage of their discretionary power to refuse enforcement. *Id.*; see also Reynolds, *supra* note 30, at 382. Japan’s legislation to implement the Convention reflects the traditional unenforceability problem, as it “contains extensive provisions for enforcement of a return order.” Jeremy D. Morley, *Japan and the Hague Abduction Convention: Implementation and Practical Effects*, INTERNATIONAL FAMILY LAW FIRM (June 11, 2014, 1:36 PM), <http://www.internationalfamilylawfirm.com/search?updated-max=2014-07-03T12:19:00-07:00&max-results=20&start=13&by-date=false>. These

legislative enforcement mechanisms will at least give Japanese courts deciding Convention cases a starting point in the “unprecedented” realm of enforceable family court orders; however, as one commentator suggests, “[t]ime will tell whether they prove to be effective.” *Id.* If Japan’s enforcement provisions prove successful, then it is of even greater concern that its courts tend to grant sole custody arrangements in favor of mothers and Japanese citizens at the expense of fathers and foreign parents. Contrarily, even if enforceability remains weak, the need to bring Japan into compliance through a neutral process persists. As discussed above, the Convention primarily serves to return children to their States of habitual residence, which, by implication, necessitates an enforceable court order. Inevitably, Japanese courts will enforce Convention return orders to some extent, lest the international

Finally, Japanese courts often demonstrate bias in family court proceedings, both in favor of a mother over a father and in favor of a Japanese parent over a foreign parent.¹²⁰ Taimie L. Bryant's research in the 1980s and 1990s illustrates the motive to preserve Japanese identity.¹²¹ In Bryant's initial study—between 1981 and 1984—of family court mediation proceedings¹²² involving a Japanese parent and a foreign parent, she observed that every decision entailed “elaborate provisions to protect the [child's] Japanese identity at the expense of [his or her] non-Japanese identity.”¹²³ While the Japanese parent usually won the custody battle, the non-Japanese parent won only in limited circumstances where he or she agreed to raise the child with an exclusively Japanese identity.¹²⁴ For instance, the foreign parent could agree to a condition that “in the event of remarriage to a non-Japanese or relocation outside of Japan, there would be another round of mediation to reassess custody.”¹²⁵ In her second study in 1992, Bryant found that although non-Japanese mothers were awarded custody more often than before, factors such as which parent was more familiar with the Japanese language or which would be more likely to raise the child with a Japanese identity almost always factored into the decision.¹²⁶ Moreover, not a single actor in the mediation proceedings ever mentioned the possibility of “bicultural identity” or “blended families” with regard to the environment in which the child would mature after the parents' divorce.¹²⁷

As discussed above, Japan does not recognize joint custody and usually grants sole custody to the mother.¹²⁸ This precedential pattern may limit Convention-return proceedings. For instance, if a mother were to wrongfully abduct and retain her child in Japan in violation of the Convention, it would be difficult to imagine a Japanese judge dispensing

pressure overwhelm them, and Japan's detailed provisions written for that purpose likely indicate that they will at least try.

120. Reynolds, *supra* note 30, at 382–84.

121. Taimie L. Bryant, *Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1, 18–19 (1995).

122. Mediation is required before parties can litigate most family law disputes in Japan. *Id.* at 2.

123. *Id.* at 18.

124. *Id.*

125. *Id.* at 18 n.43.

126. *Id.* at 19.

127. *Id.*

128. Reynolds, *supra* note 30, at 380, 382–83.

with her arguments and promptly returning the child to his or her father in the State of habitual residence. Notably, the Convention defines a violation of the treaty as a breach of the rights of custody of the left-behind parent.¹²⁹ This definition seems to presume that the left-behind parent is capable of having legal custody rights over the child.

This presumption is generally true in Convention proceedings.¹³⁰ For example, in the U.S., joint custody arrangements are increasingly preferred.¹³¹ Some American states have statutory presumptions in favor of joint custody, in which case the parents share equal legal rights over the child after divorce, rebuttable only by a showing of legitimate justification for why the arrangement is inappropriate.¹³² As for the states that do not explicitly delineate such presumptions, statutes affecting custody have been revised to reflect new cultural preferences in favor of dual-parent involvement after divorce, and traditional presumptions favoring maternal custody have been largely eliminated.¹³³ Likewise, many other Member States are moving towards a post-divorce presumption in favor of joint custody.¹³⁴

However, in Japan, where joint custody is neither culturally embedded nor evident in judicial decisions,¹³⁵ a court would likely struggle to recognize the validity of left-behind parents' joint custody rights. Such hesitation would be even more likely if the left-behind parent happened to be a non-Japanese father, as discussed above.¹³⁶ Finally, in light of studies showing that Japanese judges and mediators often consider the preservation of national identity as an important factor in their decisions,¹³⁷ it seems likely that Japan will be particularly hesitant in promptly returning children to their State of habitual residence in compliance with the Convention. This remains a problem for both mothers and fathers whose children have been wrongfully abducted to Japan. Even if a Japanese court

129. Convention, *supra* note 1, at art. 3.

130. See, e.g., *Israel's Justice Minister: Divorced Parents Must Share Custody of Children*, HAARETZ.COM (Jan. 19, 2012), <http://www.haaretz.com/news/national/israel-s-justice-minister-divorced-parents-must-share-custody-of-children-1.408169> (reporting that the Israeli Justice Minister announced his intention to adopt public committee recommendations to overturn the presumption of maternal custody of young children after divorce).

131. Bernardo Cuadra, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 599 (2010).

132. *Id.* at 600.

133. *Id.* at 599.

134. Additional examples include France, Belgium, Spain, and Australia. *Love Before the Law: Child Custody Set for Overhaul*, THE LOCAL: GERMANY'S NEWS IN ENGLISH (July 2, 2010, 11:34 AM), <http://www.thelocal.de/20100702/28199>.

135. See Reynolds, *supra* note 30, at 380–81; Costa, *supra* note 36, at 376.

136. See Reynolds, *supra* note 30, at 381–83.

137. See *id.* at 383–84; Bryant, *supra* note 121, at 18–19.

were not faced with the issue of maternal bias, cultural bias favoring Japanese identity could interfere with the Convention's terms and intent.

For these reasons, Japan's current system of family law may be irreconcilable with the treaty it just ratified and now, presumably, seeks to enforce. While the Convention is grounded in "widely-accepted notions of what is in the best interests of the child," family law in Japan largely draws on "consensual arrangements in which the government provides a largely administrative function . . . without any supervision over the welfare of the child affected by them."¹³⁸ Although views on post-divorce visitation are changing in Japan,¹³⁹ Japanese courts still believe that visitation by the non-custodial parent is burdensome to the child and, consequently, award visitation rights only when they expire within a short period.¹⁴⁰

The view of Japanese courts that the interests of children are best served by granting sole custody to one parent while denying visitation to the other stands in stark contrast with the views held by the judiciaries of other Member States, which generally believe children are better off having both parents in their lives.¹⁴¹ Japan's historical approach may limit enforcement of the Convention as intended, particularly in light of the role of "undertakings" in Convention-return proceedings,¹⁴² which could theoretically establish visitation rights as a condition of the child's return.¹⁴³ If Japanese courts do not consider such an undertaking to be in

138. Jones, *supra* note 112, at 25.

139. See Reynolds, *supra* note 30, at 386; *Lawmakers Launch Group to Ensure Visitations*, *supra* note 116.

140. Boykin, *supra* note 99, at 460.

141. See *Love Before the Law*, *supra* note 134.

142. Undertakings are positive or negative conditions imposed by judges governing the relationships among the parties during the transition period until the State of habitual residence can determine the child's safety, welfare, custody, and other similar issues. See Mairead Britton, *Undertakings: Satisfactory Safeguard to Grave Risk?*, CORK ONLINE LAW REVIEW, <http://corkonlinelawreview.com/editions/2003/2003xi.pdf> (citing P v. B [1994] 3 IR 507).

143. Undertakings cover a wide range of issues and may include protective orders, orders to provide temporary financial assistance, or "promises designed to minimize emotional trauma to a child threatened with separation from a primary caretaker." Hon. James D. Gorbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, FEDERAL JUDICIAL CENTER (2012), at 101, available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf). Presumably, post-return visitation arrangements between a child and his or her parent could fall within the scope of "promises designed to minimize emotional trauma to a child threatened with separation from a primary caretaker."

the best interests of the child, they may decide to refuse return altogether and subsequently use the Convention's "interests of the child" language to justify their decision.

American and Japanese courts may apply distinct interpretations of certain specific language of the Convention. For example, an American court would likely interpret the "interests of the child" provision as requiring a child's return to his or her State of habitual residence on the assumption that its courts are better suited to make determinations affecting the child's welfare. However, a Japanese court would likely interpret the same provision as giving it the discretion to refuse a child's return, as doing so would contradict its policy of minimizing changes in custody arrangements and limiting decisions regarding assigning the child to a single parent. If the Convention is really founded on furthering the interests of children, as it claims to be, then Japan's assessment of what "interests of the child" means may be irreconcilable with other Member States' interpretations.

b. Japan's Motive to Protect Female Citizens from Domestic Violence

Another major reason to presume that the Japanese judiciary will construe the Article 13(b) exception broadly and subjectively is the Japanese government's desire to protect women fleeing from domestic abuse, which it articulated prior to its decision to ratify the Convention.¹⁴⁴ The U.S. government does not recognize Japan's domestic violence apprehension as a valid concern and certainly not as a legitimate justification for circumventing the Convention.¹⁴⁵ The U.S. State Department noted that it has not found a significant number of cases involving actual domestic violence between parents and, in many cases, it found that the allegations of domestic violence were largely unsubstantiated.¹⁴⁶

However, of the nine Convention cases decided by U.S. Courts of Appeals between July 2000 and January 2001, seven involved mothers who abducted their child(ren) on the basis of alleged domestic violence.¹⁴⁷ This illustrates that domestic abuse is actually a relatively common issue that arises in connection with Article 13(b) situations, and it certainly cannot be said that American courts are unfamiliar with it. Regardless of the official U.S. perspective, it is commonsensical that a genuine situation of domestic violence can pose a "grave risk of harm" to a child returned

144. Reynolds, *supra* note 30, at 386–87.

145. Costa, *supra* note 36, at 371–72.

146. *Id.*

147. Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 277 (2002).

to such circumstances. U.S. courts have recognized this¹⁴⁸ and have recently moved toward allowing the Article 13(b) defense in cases of domestic abuse overall.¹⁴⁹ Moreover, the Sixth Meeting of the Special Commission to Review the Operation of the Convention concluded that the consideration of domestic violence is properly within any application of Article 13(b).¹⁵⁰

Many other Convention signatories have considered the issue of allegations of inappropriate behavior or sexual abuse in the Article 13(b) context.¹⁵¹ The accusations were dismissed as unfounded in certain cases in Belgium,¹⁵² Canada,¹⁵³ France,¹⁵⁴ New Zealand,¹⁵⁵ and Switzerland,¹⁵⁶ illustrating the straightforward approach taken by many Member States. However, where the accusations are not unfounded, courts are divided over “whether a detailed investigation should be undertaken in the State of refuge, or . . . the State of habitual residence, with interim measures being taken to attempt to protect the child on his return.”¹⁵⁷ In cases in the

148. See, e.g., *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

149. Jeremy D. Morley, *The Future of the Grave Risk of Harm Defense in Hague Cases*, THE LAW OFFICE OF JEREMY D. MORLEY: INTERNATIONAL FAMILY LAW, http://www.international-divorce.com/grave_risk_harm_defense.htm.

150. HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS AND REPORT OF PART I OF THE SIXTH MEETING OF THE SPECIAL COMM'N ON THE PRACTICAL OPERATION OF THE 1980 HAGUE CHILD ABDUCTION CONVENTION AND THE 1996 CHILD PROT. CONVENTION ¶ 129 (2011), available at <http://www.hcch.net/upload/wop/abduct2012pd14e.pdf>.

151. See generally HAGUE CONFERENCE ON PRIVATE INT'L LAW, CASE LAW ANALYSIS, <http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1> (follow “Exceptions to Return” hyperlink; then follow “Grave Risk of Harm” hyperlink; then follow “Analysis of Inappropriate Behaviour / Sexual Abuse” hyperlink).

152. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Civ Liège, Réf, March 14, 2002, REVUE TRIMESTRIELLE DE DROIT FAMILIAL [Rev.trim.dr.fam] 2003, 398 (Belg.).

153. Droit de la Famille - 2675 (1997) (Can.); J.M. c. H.A., Droit de la Famille - 08497, (2008) (Can.).

154. Cour d'appel [CA] [regional courts of appeal] 3eme chambre de la famille, March 4, 1998, 5704759 (Fr.).

155. *Wolfe v. Wolfe* [1993] NZFLR 277 (N.Z.).

156. Obergericht des Kantons Zürich [Appellate Court of the Canton Zurich], Jan. 28, 1997, U/NL960145/II.ZK, (Switz.).

157. CASE LAW ANALYSIS, *supra* note 151.

United Kingdom,¹⁵⁸ Finland,¹⁵⁹ and Ireland,¹⁶⁰ the courts ordered return with mandatory investigation in the State of habitual residence, whereas courts in China¹⁶¹ and the U.S.¹⁶² ordered return with a mandatory investigation in the State of refuge. However, some United Kingdom¹⁶³ and U.S.¹⁶⁴ courts refused return altogether. This variation in outcomes among Member States applying the Article 13(b) defense to domestic violence situations is alarming because many of these States have cultural and legal similarities and have been Convention signatories for many years.¹⁶⁵ There is certainly no reason to believe that Japan will be an exception to this trend of decisional inconsistency in light of Japan's clearly expressed concern about protecting victims of domestic abuse.¹⁶⁶ It is more likely that Japan's Convention decisions will fall closer to the "refusal of return" end of the spectrum than the "dismissal of accusations" end.

The fact that Member nations have varying interpretations of domestic violence likely strengthened Japan's initial hesitation to join the treaty.¹⁶⁷ If Japan views domestic violence more broadly than the U.S. and other Member States, then Japanese courts will likely apply a more expansive Article 13(b) interpretation than other States would think necessary to ensure the safety of children. For instance, Japanese courts might deny a child's return on the basis of a "grave risk of harm" where there are only bare allegations of abuse and minimal concrete supporting evidence, or

158. N. v. N. (Abduction: Article 13 Defence) [1995] EWHC (Fam) 116, 1 FLR 107 (Eng.).

159. Supreme Court of Finland [1996] 151, S96/2489.

160. A.S. v. P.S. (Child Abduction), [1998] 2 I.R. 244, (Superior Appellate Court) (Ir.).

161. D. v. G., 1179 HKCU 1 (Appellate Court 2001) (China).

162. Danaipour v. McLarey, 286 F.3d 1, 26 (1st Cir. 2002); Kufner, 480 F. Supp. 2d at 516.

163. Q., Petitioner (2001) S.L.T. 243 (Scot.).

164. Danaipour, 386 F.3d at 303.

165. For example, Canada ratified the Convention on June 29, 1983. STATUS TABLE, *supra* note 2. Canada and the U.S. both have common law legal systems, which emphasize "judicial independence as a prerequisite to justice." Selina Koonar, *Justice Systems in Canada and the United States*, AMERICAN BAR ASSOCIATION, BUSINESS LAW SECTION: YOUNG LAWYER FORUM NEWSLETTER (2009), available at http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/10_summer_lit_feat1.html. Canada's legal system has even borrowed American case law for precedential value in certain areas of Canadian law that lack sufficient precedents, such as privacy rights. *Id.*

166. See Reynolds, *supra* note 30, at 369–70.

167. See Costa, *supra* note 36, at 371–72.

where the prospective abuse, if actuated, would endanger someone other than the child.¹⁶⁸

Consequently, the Convention's primary goal of promptly returning children to their State of habitual residence would often be circumvented in a way that the U.S. and many other States would find wrongful or non-compliant. In any case, the courts of the State of habitual residence should be the ones making these types of determinations if they are to uphold the spirit of the Convention. Scholars have emphasized that Article 13(b) is not an automatic bar to the return of a child in the context of domestic abuse allegations; rather, it is suggested that a proper application should include consideration of evidence regarding the returned-to State's ability to protect the child.¹⁶⁹

B. Difficulties Arising from Japan's Implementing Legislation

Another reason to question Japan's likely enforcement of the Convention is because of the details specified in its implementing legislation, "The Act in Connection with the Implementation of the Convention on the Civil Aspects of International Child Abduction" ("the Act").¹⁷⁰ The Act contains 153 articles, exclusive of the rules that the Japanese Supreme Court will eventually provide to further outline the procedures under the Convention.¹⁷¹ Under Articles 119 and 120 of the Act, a losing party is allowed to apply for retrial after exhausting appeals opportunities, a process that some criticize as "inconsistent with the Convention mandate that return cases be handled expeditiously."¹⁷²

Another aspect of the Act that may present problems for petitioning parties is its provision for court-directed mediation of Convention disputes.

168. Alternatively, as previously discussed, U.S. courts today would likely require concrete evidence and proof of specificity. Thus, an issue of inconsistent interpretation arises.

169. See Reynolds, *supra* note 30, at 389 (citing Julie Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 73 (2008)).

170. "Act for Implementation of the Convention on the Civil Aspects of International Child Abduction" (tentative translation), Act No. 48 of 2013 (Japan), *available at* www.hcch.net/upload/abduct_impl_act_jp.pdf [hereinafter the Act].

171. *Id.*; Jones, *supra* note 112, at 22.

172. Jones, *supra* note 112, at 23. Further, Articles 122 and 123 authorize the court in a return case to prohibit an abducted child's removal from Japan. However, Japanese courts never claimed such express authority before deciding to ratify the Convention, so this provision may raise suspicion regarding Japan's intentions to strictly comply with the Convention's mandates. See *id.*

Pursuant to Article 144 of the Act, a court “with the consent of the parties, by its own authority, may refer the case seeking the return of the child to the conciliation of domestic relations at any time.”¹⁷³ Under Article 145, any agreement reached through such conciliation “shall have the same effect as a final order to order the return of the child that has become final and binding.”¹⁷⁴ Further, Article 146 allows the court to suspend the Convention proceedings until the conciliation is complete,¹⁷⁵ and Article 147 provides that, when conciliation concludes, “it shall be deemed that the petition for the case seeking return of child has been withdrawn.”¹⁷⁶ One concern arising from these articles is that Japanese judges frequently have various means of promoting agreement between the parties; “[i]f this results in return cases being funneled into the same sort of mediation already used in domestic custody cases and held before mediators who must be Japanese nationals, it may not be good thing for a non-Japanese parents.”¹⁷⁷ Moreover, the Act does not clearly delineate the process of reactivating a Convention case if mediation discussions become deadlocked, which may place foreign parents at an even greater disadvantage.¹⁷⁸

More importantly, Article 28(1)(iv) of the Act serves to replicate the Article 13(b) “grave risk of harm” exception of the Convention, but Article 28(2) gives the Court discretion to consider a wide range of factors in determining whether the exception applies.¹⁷⁹ Judges may look to the risk

173. The Act, *supra* note 170, at art. 144.

174. *Id.* at art. 145.

175. *Id.* at art. 146.

176. *Id.* at art. 147.

177. Jones, *supra* note 26.

178. *Id.* While there are strong justifications for favoring mediation over other legal processes, there is significant evidence indicating the inadequacy of Japan’s current family law mediation system. Mediation is required before litigation of most family law disputes in Japan, but the mediation “perpetuates the ideal of having one family model within Japanese society.” See Bryant, *supra* note 121, at 2. Private mediation services are lacking, putting a tremendous burden on the public system. *Id.* at 9. As a result, “the qualifications, training, and perspectives of the mediators cannot help but influence the role of family court mediation in shaping the concepts of the family.” *Id.* Thus, allowing Japan’s mediators to determine post-Convention-return conditions will fail to address the root of the problem. Japanese mediators would likely display the same biases as Japanese courts, and foreign nations would lack the incentive that they would have if assured of a neutral mediation process.

179. Jones, *supra* note 112, at 24. The full text of Article 28(2) reads: “The court, when judging whether or not the grounds listed in item (iv) of the preceding paragraph exist, shall consider all circumstances such as those listed below: (i) Whether or not there is a risk that the child would be subject to the words and deeds, such as physical violence, which would cause physical or psychological harm (referred to as “violence, etc.” in the following item) by the petitioner, in the state of habitual residence; (ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence; (iii) Whether or not there are circumstances that make it

of violence, which includes verbal violence, towards either the taking parent or the child if he or she were to be returned.¹⁸⁰ Judges may also consider the presence of circumstances that might hinder the ability of the taking parent or requesting parent to care for the child after the child's return, which, as one author has suggested, is effectively "authorizing something close to an evaluation of both parents' custodial capacities" in violation of Article 19 of the Convention.¹⁸¹

Article 28 of the Act is particularly problematic, as it shows that the Japanese government was likely using its implementing legislation to circumvent the intent of the Convention even before officially ratifying it. Furthermore, Japan is explicitly broadening the scope of the Article 13(b) exception beyond what other States interpret the proper scope to be. Pursuant to the language of the Act, a Japanese court deciding a Convention case must consider whether there is a risk that the child would be subject to "words and deeds" (subsequently referred to as "violence, etc.") that would cause physical or psychological harm upon the child's return to the State of habitual residence.¹⁸² Courts must also consider whether the respondent would be subject to "violence, etc." by the petitioning parent in a way that would cause psychological harm to the child if the respondent and child were both to return to the State of habitual residence.¹⁸³ Finally, a court must consider whether any circumstances exist that would make it difficult for either parent to care for the child in the State of habitual residence.¹⁸⁴ Under Japan's intended scheme, a foreign parent could presumably risk losing his or her children to the Japanese abductor-parent merely because the foreign parent might raise his or her voice at a child, or even the Japanese parent, in a way that would constitute verbal violence.¹⁸⁵ Moreover, a court could potentially deny a child's return to the foreign, left-behind parent on the sole ground that the foreign parent is going through financial difficulties and thus may experience some hardship due

difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence." The Act, *supra* note 170, art. 28(2).

180. Jones, *supra* note 112, at 24.

181. *Id.* at 24–25.

182. The Act, *supra* note 170, at art. 28(2)(i).

183. *Id.* at art. 28(2)(ii).

184. *Id.* at art. 28(2)(iii).

185. See *id.* at art. 28(2)(i) (referring to "the words and deeds . . . which would cause physical or psychological harm" (emphasis added); *id.* at art. 28(2)(ii).

to the additional expenses of raising a child.¹⁸⁶ Granted, the interpretation would be entirely within the discretion of the Japanese court. Taken as a whole, these legislative provisions enacted by Japan to implement the Convention into domestic law tend to render some suspicion regarding its prospective compliance.¹⁸⁷

*C. Circumstances of Japan's Ratification as a Factor
Indicating Conflict*

The circumstances surrounding Japan's ultimate decision to ratify the Convention are themselves indicative of the likelihood that Japan will not strictly uphold the Convention. Some commentators note that Japan ultimately conceded to the treaty only after overwhelming international pressure by the U.S. and other Member States.¹⁸⁸ In 2007, the pressure began with a U.S. initiative calling on Japan to take immediate measures to solve the problem of international parental child abduction.¹⁸⁹ In 2009, having yet to receive effective response, the U.S., sponsored by the U.S. Embassy in Tokyo, initiated a "Symposium on International Parental Child Abduction" to address Japanese courts' ineffective resolution of the problem.¹⁹⁰ The embassies of the U.S., United Kingdom, France, and Canada subsequently issued a joint press release encouraging Japan to ratify the Convention.¹⁹¹

International pressure continued in early 2010 when the U.S. and seven other Western nations sent ambassadors to meet with the Japanese Prime Minister aiming to encourage Japan to address domestic family law issues relating to custody.¹⁹² In September 2010, the U.S. passed House Resolution 1326, calling on the Japanese government to address the problem of U.S. citizen children being abducted to and retained in Japan, and

186. See *id.* at art. 28(2)(iii) (referring to "circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence").

187. Jones, *supra* note 112, at 24–25.

188. See Yaffa Fredrick, *Japan's Child Abduction Laws in Limbo*, WORLD POLICY BLOG (May 6, 2014), <http://www.worldpolicy.org/blog/2014/05/06/japans-child-abduction-laws-limbo> (quoting Jeremy Morley); Jane Kitagawa, *Left Behind: Parents Challenge Japan's Dismal Child Abduction Laws*, METROPOLIS (Jan. 23, 2014), available at <http://www.internationalfamilylawfirm.com/2014/01/left-behind-parents-challenge-japans.html> (quoting Bruce Gherbetti).

189. The initiative referred to is the "Openness Promotes Effectiveness in our National Government Act." Openness Promotes Effectiveness in Our National Government Act, Pub. L. No. 110-175, 121 Stat. 2524 (2007); Boykin, *supra* note 99, at 458–59.

190. Boykin, *supra* note 99, at 459.

191. *Id.*

192. *Id.*

urging Japan to cooperate with other nations and promptly adopt the Convention.¹⁹³

Another symposium was held in March 2010, where ambassadors to Japan from the U.S. and several other countries met with Japanese officials to hear expert discussions on international parental child abduction.¹⁹⁴ At the conclusion of the symposium, the ambassadors issued a more favorable press release, still urging Japan to join the Convention, but indicating that Japan had made some positive efforts and initiatives.¹⁹⁵ In May 2011, Japan created a legislative plan to move towards conformity with the Convention, and, in July 2011, a Justice Ministry panel convened to establish judicial procedures for returning children pursuant to the Convention.¹⁹⁶ Finally, in November 2011, the Japanese Prime Minister announced that the bill to join the treaty would be sent to the Japanese legislature.¹⁹⁷

Considering this extensive record of international pressure, it is highly unlikely that Japan joined the Convention on its own initiative. Currently, it seems doubtful that Japan will emerge as a strict enforcer of a treaty to which it probably never wished to belong in the first place. Until Japan implements domestic reforms to conform its family law and court systems to the intent of the Convention, prospects of compliance remain uncertain.

IV. A PROSPECTIVE INTERNATIONAL SOLUTION

As discussed below, international mediation provides the necessary element of neutrality to achieve successful enforcement of the Convention. At the outset, mediation has certain advantages and limitations that warrant discussion. Next, an exploration of the proposed system of international mediation will demonstrate how it would overcome the

193. Under the precise language of the Resolution, Japan is called on to address “[t]he urgent problem of abduction to and retention of the United States citizen children in Japan, to work closely with the Government of the United States to return these children to their custodial parent or to the original jurisdiction for a custody determination in the United States, to provide left-behind parents with immediate access to their children, and to adopt without delay the 1980 Hague Convention on the Civil Aspects of International Child Abduction.” *Id.* (quoting H.R. 1326, 111th Cong. (2d Sess. 2010)).

194. *Id.*

195. Notably, by May 2010, Japan had already been pressed to ratify the Convention by thirty-two countries. *Id.* at 460.

196. *Id.* at 461.

197. *Id.* at 462.

typical disadvantages of mediation and incorporate effective mechanisms, including undertakings, measures expanding mediator authority, selection of mediators through an ideal candidate body, and comprehensive selection standards and training of mediators. An illustration will then show how the proposed international mediation system would function in practice. Finally, the overarching issue of whether the proposed system requires an amendment to the Convention will be addressed.

A. Mediation as a Means of Achieving Neutrality in Convention Enforcement

In recent years, the U.S. proposed and implemented measures in response to Convention non-compliance.¹⁹⁸ There is some evidence that unilateral, serious sanctions targeting one particular country are effective;¹⁹⁹ however, such a tactic does not address the cause or the extent of the problem internationally. From an international perspective, the primary issue is that countries are able to take advantage of the broad language of the Convention's exceptions, interpreting them in a way that satisfies their own nationalistic biases and ultimately thwarting the Convention's purposes. The problem of favoring one's own country may be intransigent and hence, any effective solution must inject an element of neutrality into the judicial process.

In the context of the Article 13(b) defense to returning a child to his or her State of habitual residence, one way such neutrality and consistency may arise is through international mediation. Theoretically, such a system would provide an international list of mediators, a body charged with

198. For instance, the "Sean and David Goldman International Child Abduction Prevention and Return Act of 2014" was introduced in Congress on September 28, 2013 and signed by the President on August 8, 2014; it authorizes the President to take certain actions against noncompliant countries, including: "a demarche (a diplomatic request or intercession with a foreign official or a protest about a government's policy or actions); an official public statement detailing unresolved cases; a public condemnation; a delay or cancellation of one or more bilateral working, official, or state visits; the withdrawal, limitation, or suspension of U.S. development or security assistance, or assistance to a central government; a formal request to a foreign country to extradite an individual who is engaged in abduction and who has been formally accused of, charged with, or convicted of an extraditable offense; or other commensurate actions". See Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, H.R. 3212, 113th Cong. (2d Sess. 2014), at § 202 [hereinafter Sean and David Goldman Act of 2014].

199. An example can be found in the case of Sean Goldman in 2009, where the U.S. was successful in its petition for the child's return from Brazil only after congressional threats that involved cutting off trade benefits. The threats, if carried out, would have caused a substantial economic impact. See *Sean Goldman's Return to U.S. Imminent?*, CBS NEWS (Dec. 23, 2009, 7:25 AM), <http://www.cbsnews.com/news/sean-goldmans-return-to-us-imminent/>.

selecting candidates, and specific criteria for how mediators would be chosen and certified. The parties involved in a Convention dispute would then have to stipulate to submit to mediation in the country retaining jurisdiction over the matter (i.e., the court of the abducted-to nation).

As an introductory example, consider a child whose mother abducts him from his habitual residence in Japan, in breach of his father's custody rights, and takes him to the United States. The mother then initiates Convention proceedings in the U.S. and invokes the Article 13(b) exception, on grounds that clearly fall short of a typical "grave risk of harm" situation. The Convention would mandate the Court to order the child's return to Japan, but it could also order mediation to resolve disputes between the parties over any issues beyond the scope of the Convention.²⁰⁰ Both parties would then have to stipulate in the U.S. court to be bound by the outcome of international mediation, and subsequently choose and agree on a representative from the list of international mediators to handle their case. Ideally, the parties would reach a mutually agreeable solution with the assistance of the international mediator. The mediator would draft an opinion reflecting the parties' agreements, and the U.S. court could subsequently adopt the mediated solution as a judicial order. An even more effective solution would allow (or oblige) the Japanese court to register a mirror order of the U.S. judicial order, thus giving it binding legal effect in both States.

B. Mediation: Background, Advantages, and Limitations

Mediation is "one of the most widely promoted methods of alternative dispute resolution in family law."²⁰¹ The 2001 meeting of the Special Commission to review the operation of the Convention ("the Commission") recommended that "Central Authorities"²⁰² regularly seek voluntary return

200. For example, such issues might encompass visitation, custody, contact, living arrangements, payment of child support, or reimbursement of other expenses. Delegating the resolution of these issues to international mediation would likely give courts a greater incentive to return children to their States of habitual residence without delay.

201. HAGUE CONFERENCE ON PRIVATE INT'L LAW, REVISED DRAFT: GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS ON INTERNATIONAL CHILD ABDUCTION, PART V—MEDIATION 11, *available at* http://www.hcch.net/upload/wop/abdguide5_mediation_en.pdf [hereinafter GUIDE TO GOOD PRACTICE].

202. "Central Authorities" are the organizational bodies charged with communication related to, and implementation of, the Convention within their respective Member States. For example, in the U.S., the Central Authority is the U.S. Department of State, Office of

“where possible and appropriate . . . by referral of parties to a specialist organization providing an appropriate mediation service.”²⁰³ The Commission also recognized that courts play a central role in that respect.²⁰⁴ At a 2009 Council meeting, members of the Hague Conference adopted conclusions and recommendations requiring the establishment of a “Working Party” (“the Party”) to “promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children.”²⁰⁵ The Party consisted of experts from independent mediation groups, from a handful of parties to the Convention, and from non-contracting States.²⁰⁶ The Party subsequently created “Draft Principles” for establishing mediation structures, which some States had already adopted into domestic law by early 2011.²⁰⁷ Those same States also designated “Central Contact Point[s]” for international family mediation, which provide specialized information regarding international mediation services in their respective jurisdictions.²⁰⁸ The 2011 Commission meeting encouraged other States to follow the trend by creating their own “Central Contact Point(s).”²⁰⁹

For purposes of using international mediation to resolve Convention disputes, the establishment of the Party indicates some progression. Ideally, another Hague Conference should be held in order to encourage the expansion of this group of experts. The experts could then work together to create mediation structures similar to the ones discussed above, but this time with the goal of establishing a single, uniform international mediation system. The structure would ultimately serve as a blueprint for the selected international mediators. As for the “Central Contact Point(s)” already initiated by some States, it may be beneficial to draw candidates for the international mediator list from those offices’ databases because they

Children’s Issues. HAGUE CONFERENCE ON PRIVATE INT’L LAW, AUTHORITIES UNDER THE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: UNITED STATES OF AMERICA, http://www.hcch.net/index_en.php?act=authorities.details&aid=133. As for Japan, it designated the Ministry of Foreign Affairs as its Central Authority. HAGUE CONFERENCE ON PRIVATE INT’L LAW, AUTHORITIES UNDER THE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: JAPAN, http://www.hcch.net/index_en.php?act=authorities.details&aid=974.

203. GUIDE TO GOOD PRACTICE, *supra* note 201, at 14. The 2006 meeting of the Commission reaffirmed the 2001 recommendations. *Id.*

204. *Id.*

205. *Id.* at 15.

206. *Id.* at 16.

207. *Id.*

208. *Id.* at 39.

209. *Id.*

likely possess valuable international mediation skills and could be summoned from various States that are parties to the Convention.²¹⁰

Mediation has several advantages over other forms of dispute resolution. For instance, mediated solutions are more sustainable and more likely to achieve compliance than court solutions.²¹¹ Moreover, mediation is flexible, cost-effective,²¹² and “empowers the parties to face future conflicts in a more constructive way.”²¹³ Disadvantages of mediation include the risk that agreed-upon solutions will not have legal effect in the future,²¹⁴ the special attention required in situations of possible domestic violence, and the impossibility of resolving some conflicts in a civil manner. Another problem that arises in the context of international family mediation is the fact that jurisdictions often have different perspectives of how much weight to accord the best interests of the child.²¹⁵ Because mediators have limited procedural powers (e.g., with regard to interviewing the child), certain safeguards may be necessary to protect the best interests of the children.²¹⁶

210. See *id.* Presumably, every mediator candidate should reside in a country that has ratified the Convention. Otherwise, the mediators would have no relevant connection to the treaty.

211. *Id.* at 20.

212. *Id.* at 20–21. The advantage of cost-effectiveness is particularly important in the context of Convention proceedings, as the left-behind parent often lacks the financial resources necessary to travel to the abducted-to nation and litigate there for an extended period of time. For instance, in the previously cited case of Sean Goldman, the father (David Goldman) spent approximately \$360,000 in legal and travel expenses over a period of four and a half years. Timothy Weinstein, *The Financial Cost of Child Abduction*, BRING SEAN HOME FOUNDATION (Apr. 2009), <http://bringseanhomework.org/resources/the-left-behind-parent/the-financial-cost-of-child-abduction/>. However, mediation is generally much less expensive than litigation. See Matthew Rushton, *Counting the Cost of Mediation*, JAMS INT'L BLOG (Jan. 17, 2014), <http://www.jamsinternational.com/mediation/counting-cost-meditation>.

213. GUIDE TO GOOD PRACTICE, *supra* note 201, at 20.

214. For instance, some jurisdictions refuse to give legal effect to mediated solutions without court approval. Also, legal systems may restrict parents' ability to limit child support payments by agreement. *Id.* at 22–23.

215. See EUROPEAN COURT OF HUMAN RIGHTS, INTERNATIONAL CHILD ABDUCTIONS: FACTSHEET (citing *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010, §§ 132–37), available at http://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf (“The child’s interest. . . dictates that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to ‘rebuild’ the family.”) This view does not seem to align with the Japanese cultural view that children’s best interests are served by sole custody arrangements, as discussed above.

216. GUIDE TO GOOD PRACTICE, *supra* note 201, at 20.

Moreover, to address the enforcement concern, “appropriate procedures should be made available to give legal effect to mediated agreements, be it by court approval, court registration, or otherwise.”²¹⁷

C. The Proposed International Mediation System as an Effective Mechanism

In light of these considerations, the proposed solution of international mediation must address the disadvantages of mediation, as well as provide adequate training, standards, and evaluation of international mediators. In the context of a Convention proceeding, the major disadvantages of mediation would likely include: (1) the risk of lack of future enforcement of mediated solutions; (2) the inconsistency of views regarding the best interests of the child; and (3) the unique sensitivity of cases involving domestic violence.

Overcoming the risk of the legal unenforceability of mediated solutions in the future is feasible. As previously mentioned, both the party from the abducted-to State and the party from State of habitual residence would have to stipulate to mediation in the court with jurisdiction over the Convention proceedings (i.e., the court of the abducted-to State). Assuming the parties reach such a stipulation, the Court would then have authority to order them to pursue mediation and be legally bound by its outcome. After mediation, the Court of the abducted-to State could adopt the mediated solution—drafted by the mediator in the form of a legal opinion—as a judicial order. That would ensure the enforceability of the mediated solution in that State.

However, the enforceability of the mediated solution in the State of habitual residence may be more problematic. To overcome that concern, the court of the returned-to State should have a means of registering a judicial order that mirrors the original order in the abducted-to State.²¹⁸

217. *Id.* at 25.

218. For instance, the UCCJEA, adopted in the U.S., provides for the registration of foreign orders. *See* U.S. COUNTRY PROFILE, *supra* note 17, at 53. This notion of giving “full faith and credit” to judicial orders of other nations may be problematic in some situations. For instance, the U.S. would likely be hesitant to give full faith and credit to judicial orders of countries that do not share American political, humanitarian, or other ideals, such as Saudi Arabia, Iran, Cuba, or North Korea. However, international mediation should help mitigate the concern because the court orders that are ultimately adopted will be shaped by neutral mediators who duly consider the interests of U.S. citizen children. Furthermore, none of the above-listed countries are parties to the Convention. If those countries join in the future, the issue may need to be revisited, but it is currently beyond the scope of the Convention. If the issue does arise, the Article 20 exception may come into play, allowing refusal of return if the humanitarian and freedom-related

As a result, the mediated solution would be legally enforceable in the returned-to State as well. The parties would likely comply with the solution after the child is returned not only because they could face legal consequences, but also because they would have been actively involved in the process of creating the solution. Additionally, after recognizing the advantages of mediation—particularly the financial cost savings, as discussed above—the parties would not likely have any desire to return to a formal, adversarial court setting.

With respect to the other concerns of how to determine the best interests of the child and the sensitive nature of domestic violence cases, adequate training, selection standards, and evaluation of international mediators can largely address those. Because the Convention is explicitly premised on furthering the interests of children, that goal should both be emphasized in training and be incorporated into the selection process. Mediators who are ultimately selected should be committed to seeking solutions that further the interests of children worldwide and be knowledgeable of the Convention's other underlying principles. In practice, the mediators should not be subject to procedural limitations such as being restricted from interviewing the child. Instead, they should have wide latitude to discover relevant evidence and subsequently use that information to assist the parties in reaching agreements. Additionally, mediators should be regularly evaluated by a neutral panel to ensure that their conduct is both effective and consistent with the principles of the Convention. The panel performing the evaluation should analyze mediators' records in light of how they have considered the interests of children in the past, their ability to maintain a neutral perspective, and their overall capacity to lead parties to successful agreements.

The Convention's objective of furthering the interests of children is most critical at this stage because the original judicial decision to return a child or to not return a child will often dictate prompt return to the State of habitual residence without any significant consideration of what is in the child's best interests. Moreover, States will be more willing to return children to their countries of habitual residence if they are assured that the children's best interests will be adequately accounted for in subsequent mediation. Thus, international mediation would strengthen compliance with the Convention by means of prompt return to the State of habitual

principles of the returned-to State would be inconsistent with return. *See* Convention, *supra* note 1, at art. 20.

residence (including a more proper, narrow application of the “grave risk of harm” defense), as well as eliminate nationalistic bias by giving States a way to ensure the safety of their citizens through a neutral process.

The training and selection of mediators can also address the concern regarding the unique nature of domestic violence cases. Training programs should incorporate extensive teachings about domestic violence and emphasize what special attention is required in such cases to reach mediated solutions. To improve skill level, candidates with valuable experience in domestic violence disputes should have priority over other candidates, and experts should have continuous opportunities to contribute knowledge to the selected mediators, perhaps at international conferences or lectures.

The fact that amicable solutions are not always possible is an inevitable risk of mediation. Undoubtedly, there will be circumstances in which international mediators will be unable to lead the parties to agreeable solutions regarding the legal relationships between them after a child’s return. Regardless, international mediation will likely strengthen States’ compliance with the Convention across the spectrum. Even if all mediations do not result in agreement, the mere prospect that many will is sufficient to warrant implementation of the system. Parties who do not reach mediated agreements will presumably have to resort back to the current system of domestic litigation. Seemingly, then, there is nothing to lose.

1. Undertakings as a Component of International Mediation

In response to the unique nature of domestic violence cases, the judicial doctrine of “undertakings” is a proposed solution that would “strike a balance and ensure the safety of the child and mother” in such circumstances.²¹⁹ Undertakings are defined as “promises, usually by the left-behind parent to perform certain obligations and agree to certain conditions to facilitate return of the child prior to the time the foreign court assumes jurisdiction and can issue an order.”²²⁰ For example, in the context of domestic abuse, possible undertakings might include a condition forbidding contact between the abusive parent and the abducting parent effective upon the child’s return or a condition requiring that the abducting parent have “exclusive occupancy of the marital home.”²²¹ It seems that undertakings would provide relief to Japanese courts seeking to ensure the

219. Reynolds, *supra* note 30, at 390.

220. Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV 1049, 1076 n.117 (2005). Under international mediation, however, the facilitating conditions would ultimately *become* the order in the foreign jurisdiction.

221. Reynolds, *supra* note 30, at 396.

safety of their citizens, while simultaneously allowing courts to render decisions consistent with the intent of the Convention.

The international mediation system could easily incorporate undertakings in order to give Member States greater assurance of the safety and wellbeing of their citizens and would thereby improve compliance with the Convention. The Second Circuit decision in *Gaudin v. Remis* serves as a useful example of the judicial use of undertakings.²²² In that case, the father brought the children to the U.S. from their State of habitual residence in Canada and the mother subsequently petitioned in an American court for their return.²²³ The district court concluded that the Article 13(b) “grave risk of harm” defense properly applied.²²⁴ However, the Ninth Circuit remanded on the ground that “even if such a risk existed, the district court erred in failing to consider alternative remedies by means of which the children could be transferred back to Canada without risking psychological harm.”²²⁵ Courts can carefully consider and establish such remedies (i.e., judicial undertakings) to ensure the safety of the parties involved.

If parties could pursue undertakings initially through mediation and then have them as adopted as court orders in both applicable States, such undertakings would likely be more effective than judicially prescribed undertakings. Undoubtedly, each family involved in a Convention return proceeding has unique problems and circumstances. Seemingly, then, the parties involved in a particular case would be better equipped to craft their own undertakings than a judge who is not nearly as familiar with their underlying situation. Under the proposed solution, the international mediator would fill the shoes of the judge, familiarize his or herself with the details of the particular situation, and serve as a neutral third party in helping the parties determine which undertakings would best serve the interests of the child.

Another example of an undertaking that could be accomplished through international mediation to mitigate the risk of domestic violence is the establishment of a probation period in the State of habitual residence following the child’s return. During the designated period, social workers or law enforcement officers could periodically check on the parties until they

222. *Gaudin*, 415 F.3d at 1032.

223. *Id.*

224. *Id.* at 1033.

225. *Id.* at 1035.

can determine that the child is safe.²²⁶ If the parties agree to such a condition via mediation, the court in the abducted-to State could then coordinate with authorities in the returned-to State to provide the requisite services.

A court's return order can encompass undertakings and can lead to sanctions if disobeyed. However, such orders are not automatically enforceable in the country to which the child is returned.²²⁷ In overcoming this concern, the most effective solution would be registration of a mirror order in the returned-to State, reflecting the mediated agreement originally reached and subsequently adopted by the court in the abducted-to State. Any conditions would then be legally enforceable in both countries. Generally, the use of undertakings is compatible with international mediation. Mediators, unlike judges, would be able to approach each situation from a neutral point of view, assist the parties in reaching an agreement based on extensive familiarity with the case, and ultimately have a means of transforming the agreement into a legally binding court order.

2. Measures Expanding International Mediator Authority to Secure Convention Compliance

To ensure that international mediators are as effective as possible, the proposed system should incorporate certain measures to strengthen their authority. First, mediators should undertake the responsibility of drafting prospective court orders, which courts should then consider and adopt with minimal alteration. Moreover, Member States, through the United Nations, should establish an international sanctions committee to deter non-compliance with the Convention.

a. Mediator-Drafted Opinions Requiring Court Consideration

International mediators must have substantial authority to direct mediations and secure effective outcomes.²²⁸ As previously discussed, the first task

226. Alternatively, if the prospective abuse was to be targeted only at the mother, authorities could investigate that matter as well until they are certain that no abuse is occurring in the child's presence that would pose a "grave risk" of psychological or (possibly) physical harm.

227. See Silberman, *supra* note 220, at 1076 n.117; Patricia M. Hoff, *The Hague Convention on the Civil Aspects of International Child Abduction: A Curriculum for American Judges and Lawyers*, A.B.A., at 101 (Oct. 1997) (explaining that there is no legal basis for requiring enforcement in the other country, but that an order may be enforced out of comity and will at least be persuasive to the courts of that country).

228. International mediators should have much more authority than domestic family law mediators typically possess; otherwise, they will likely be ineffective. For instance, mediators generally lack power to decide any issue on the parties' behalf or to compel

of international mediators is assisting the parties in reaching a satisfactory solution. Subsequently, mediators should be required to make findings and draft an opinion for the court with jurisdiction over the Convention proceedings. The opinion should encompass the agreed-upon terms and conditions effective after the child returns to his or her State of habitual residence. The opinion should also include clear factual and legal justifications for each provision. The Court, in turn, should be legally obliged to consider the mediator's drafted opinion. Ideally, the judge would adopt the opinion as the order of the court. If the judge has certain reservations, he or she could submit a list of suggested revisions, with justifications, and request an updated draft. The mediator should make the requested changes only if they do not interfere with the intent of the Convention. In either situation, the mediator, as opposed to the judge, should possess superior control over the content of the order that is ultimately adopted.

This is an ideal scenario for multiple reasons. For one, the mediator would likely be more familiar than the judge with the details of the particular case. As such, the mediator is in a better position to create a legal solution that the parties will comply with and that furthers the interests of the particular children involved. As a disinterested party with no particular reason to favor one country over another, the mediator would also be more neutral than the judge. Thus, the mediator is more likely to draft an opinion that is free of nationalistic bias (and hence more credible from the perspective of the parties) and consistent with the international intent of the Convention.²²⁹

Another important justification for substantial mediator authority is to encourage participant cooperation in the mediation process. There will undoubtedly be times where one party or the other is not a "bona fide" participant in the sense that he or she is insisting on an outcome that is inconsistent with the Convention. In such a situation, the mediator should be able to make a finding that the party has failed to participate in the mediation in good faith. That finding should be incorporated in the drafted opinion, and the Court should be required to give it full recognition and order the party to comply. The non-compliant party should have an opportunity

their agreement. See Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 471 (1991).

229. An incidental benefit of giving international mediators the authority to draft opinions is that courts would likely bear significantly less judicial burden.

to become a “bona fide” participant by a specified deadline. If the party does not do so, the court should resolve the entire Convention dispute against the non-compliant party and in favor of the other participant. Courts will likely be hesitant to take such action when the non-compliant party is a citizen of their State. Thus, it is important to require such action by means of a legal provision in the Convention.²³⁰

b. Establishment of a Sanctions Committee to Deter Non-Compliance

Mediators must be able to effectively insist on a particular outcome in order to fulfill the Convention’s purposes. Courts may be hesitant about international mediation and some will likely refuse to comply with the mediation process, for example, by refusing to consider a mediator’s drafted opinion. Where a court chooses to ignore mediation, there should be a means of imposing economic sanctions against the State where that court sits. An international sanctions committee at the United Nations (“U.N.”) would be an effective arena for such disputes. Such a committee could easily take form as a subsection of the U.N. Security Council. Indeed, the Security Council has designated more than a dozen sanctions committees in the past.²³¹

Pursuant to Chapter IV of the U.N. Charter, the Security Council may use enforcement mechanisms “to maintain or restore international peace and security.”²³² First and foremost, the Security Council “calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement.”²³³ If diplomatic efforts fail, the Security Council may then use targeted economic sanctions to pressure certain States or entities to comply with its objectives.²³⁴ The Security Council is an appropriate body for applying sanctions internationally because of its “universal character.”²³⁵ Common examples of sanctions historically used include travel bans, arms embargoes, and freezing of financial assets.²³⁶ In recent years, the Security Council summoned independent expert groups to help monitor sanctions and achieve

230. Such a legal provision would probably require an amendment to the Convention, the implications of which will be discussed below.

231. See U.N. Charter ch. IV, arts. 10–12; *UN Security Council Sanctions Committees*, *supra* note 40.

232. *UN Security Council Sanctions Committees*, *supra* note 40.

233. *United Nations Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/>.

234. See *UN Security Council Sanctions Committees*, *supra* note 40.

235. *Id.*

236. See, e.g., *Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea*, UNITED NATIONS, <http://www.un.org/sc/committees/751/>.

compliance.²³⁷ The Secretariat also established a list of expert candidates based on specific qualifications for that purpose.²³⁸

If the courts of a particular State wrongfully disregard international mediation, the Security Council should call on that State to bring its judiciary into compliance. It should recommend specific measures that would help the State to effectuate that purpose and attempt to reach a tangible agreement (for instance, where the State promises to establish certain measures to promote compliance, or to bring its courts into compliance by a specific date). If initial efforts fail, the Security Council could draft a resolution describing the particular sanction to be enforced, the State or States to be targeted, and the “tasks mandated to monitoring mechanisms.”²³⁹ The resolution should incorporate expert recommendations regarding the most effective and least oppressive means of securing compliance under the circumstances.

After the Security Council approves the resolution, the targeted State should receive notice of the prospective sanction and how to overcome it. If the State still refuses to comply, the sanction should take effect and monitoring mechanisms should be established and executed with the help of independent experts. Ideally, the economic sanction would be burdensome enough to secure compliance of the targeted State, but not so burdensome that it would engender humanitarian concerns.²⁴⁰ At the point of compliance, the sanction would be lifted. Over time, other States would likely realize the potential repercussions of non-compliance and develop a stronger incentive to ensure judicial cooperation with international mediation.²⁴¹

237. See S.C. Res. 997, ¶ 8, U.N. Doc. S/2006/997 (Dec. 22, 2006).

238. *Id.* ¶ 11.

239. *Id.* ¶ 32.

240. An example of this view is expressed in the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, which explicitly states that any actions taken against noncompliant countries may not interfere with humanitarian assistance. Sean and David Goldman Act of 2014, *supra* note 198, at § 202.

241. Alternatively, an entirely new sanctions committee could be created for the limited purpose of reviewing Convention disputes. However, the creation of such a committee would likely be costly and time-consuming. Since the U.N. Security Council has extensive experience with establishing sanctions committees, it appears to be more prepared and better qualified to handle the task.

3. UNICEF as an Ideal Body for Selecting International Mediators

Selecting a list of international mediators is critical to the ultimate efficacy of the system. In order to achieve the desired element of neutrality, mediators should be selected by an international group. The group should not be biased towards any particular country's cultural perspectives or domestic policies. A potential candidate group for selecting international mediators is the United Nations Children's Fund ("UNICEF"). UNICEF works in more than 190 countries worldwide to help better children's lives by providing for essential needs such as health care, education, and protection from dangerous circumstances.²⁴² It is part of the Global Movement for Children,²⁴³ and it promotes the Convention on the Rights of the Child ("CRC").²⁴⁴

The CRC is an international treaty that was created in 1989 to promote the human rights of minors, including cultural, political, economic, social, and civil rights.²⁴⁵ Some of the specific rights guaranteed to children by the CRC are the rights to survival, full development, protection from external harm, and participation in family life.²⁴⁶ The CRC's explicit principles include: "non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child."²⁴⁷ Member States to the CRC are obligated to uphold the best interests of children in carrying out all domestic policies and actions.²⁴⁸

UNICEF is an ideal candidate for selecting international mediators because its principles are largely intertwined with CRC's goal to secure the best interests of children.²⁴⁹ Because the Convention itself is grounded in furthering children's interests, UNICEF would be well equipped to choose mediators in furtherance of that objective. The current problem of nationalistic bias would likely disappear in a system where mediators are

242. *About UNICEF: Who We Are*, UNICEF, http://www.unicef.org/about/who/index_introduction.html (last updated May 23, 2012).

243. The Global Movement for Children is a coalition aiming to better the lives of children throughout the world. *Id.*

244. *Id.*

245. *Rights under the Convention on the Rights of the Child*, UNICEF, http://www.unicef.org/crc/index_30177.html; Convention on the Rights of the Child, Nov. 20, 1980, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

246. *Rights under the Convention on the Rights of the Child*, *supra* note 245.

247. *CRC Turns 20: About the Convention*, UNICEF, http://www.unicef.org/rightsite/237_202.htm; Convention on the Rights of the Child, *supra* note 245, at arts. 2, 3, 6, 12.

248. *CRC Turns 20: About the Convention*, *supra* note 247.

249. *See The Convention on the Rights of the Child: About the Convention*, UNICEF, http://www.unicef.org/rightsite/237_202.htm ("The provisions and principles of the CRC guide UNICEF in its mission of advocating for the protection of children's rights, helping children to meet their basic needs and expanding their opportunities to reach their full potential").

chosen by representatives concerned primarily with the best interests of children. While States have varying interpretations of how to secure such interests, the UNICEF approach to achieving that goal would be based on neutral principles. In the context of the Article 13(b) defense to returning a child, the representatives would likely express concern over matters such as what psychological or physical harm the child might suffer as a consequence of being returned. However, they would have no inherent reason to exhibit partiality toward any particular member State. Hence, consideration of such matters would be from a disinterested perspective.

Moreover, issues that do not truly hinder the interests of children would not appeal to the biases of particular decision-makers, such as the language the child will grow up speaking, the culture that the child will identify with, or the environment in which the child will be raised.²⁵⁰ As a result, the potential to corrupt the process would be greatly reduced. The ability of courts to consider subjective issues such as a child's prospective political, social, or cultural upbringing in making Convention decisions—even when the only justification is a favoring of one's own culture—must be defeated by establishing neutrality at the outset of the process. Because promoting the interests of children is consistent with the intent of the Convention and circumventing nationalistic bias, UNICEF would be an effective selection body.

A potential concern of giving UNICEF authority to select international mediators is the fact that the U.S. has not ratified the CRC.²⁵¹ The U.S. has expressed several reservations to ratifying the CRC. One of the most important reservations is the treaty's advocacy that children and adults bear equal rights.²⁵² This may be based on "assumptions that parents will be likely to protect children's best interests, beliefs that parental autonomy, will promote healthy diversity, and concerns about the dangers of undue state intervention" into the sacred area of family life.²⁵³ The CRC grants broad

250. That assumes, of course, that neither of the alternative circumstances to which the child will be returned is substantially inadequate. For example, if the child would be returned to a dangerous environment, such as a war zone, a mediator would be correct to let that influence his or her decision.

251. The United States is the only country other than Somalia that has not ratified the CRC. Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 80 (2010).

252. *See id.* at 84–88.

253. *Id.* at 85.

rights of “participation,”²⁵⁴ “provision,”²⁵⁵ and “protection”²⁵⁶ to children, but those rights seem to be inconsistent with current U.S. law and policy.

Because UNICEF is a stark promoter of the CRC’s principles,²⁵⁷ the U.S. may be hesitant to give UNICEF the authority to select international mediators. However, the fact that the U.S. has expressed reservations regarding certain aspects of the CRC does not imply that it is inherently opposed to furthering children’s interests. In fact, the opposite is true, as the U.S. is a strong proponent of the Convention,²⁵⁸ which itself explicitly aims to further the interests of children.²⁵⁹

If the U.S. were to object to UNICEF’s selection authority as inconsistent with domestic policy, an alternative solution would be to ratify the CRC. In light of the success of international pressure as a means of securing Japan’s ratification of the Convention, a similar pattern of international pressure would likely achieve the same effect with regard to the U.S. and the CRC.²⁶⁰ After a selection group is established, it could then designate a smaller body of members to pass on applicants, send out invitations to

254. “Participation” encompasses the right of children who are capable of forming independent beliefs to express such beliefs freely in all matters impacting them. However, U.S. law displays a preference for parents’ rights to make decisions for their children in almost all such matters, “*even when this raises enormous questions as to whether the child’s best interests are served.*” *Id.* at 88–89 (emphasis added).

255. “Provision” incorporates the right of children to receive affirmative assistance from the State for purposes of social welfare, health, and education. However, the U.S. does not generally recognize the affirmative right of anyone to receive financial assistance from the government, instead promoting a tradition of “negative rights,” such as “the individual autonomy right to be free from undue intervention by the state.” *Id.* at 91.

256. “Protection” encompasses the right of children to be free from parental abuse and neglect, placing an affirmative obligation on States to protect children within their borders from such harm. Although every U.S. state is legislatively required to protect children from abuse and neglect, “children have no generally recognized constitutional right to such protection, in contrast to the generally recognized constitutional right parents have to raise their children free from undue state intervention.” Moreover, states are not constitutionally required to protect against maltreatment of children. *Id.* at 93.

257. *See The Convention on the Rights of the Child: About the Convention, supra* note 249.

258. *See* 2014 REPORT ON COMPLIANCE, *supra* note 24, at 5 (“Since the Convention provides the most effective way to facilitate the prompt return of abducted children to their country of habitual residence and to help deter abduction, encouraging countries to join the Convention is a high priority.”).

259. Convention, *supra* note 1. As previously noted, the opening sentence provides that Member States are “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody.” *Id.*

260. Another possible solution that would avoid the problem of American hesitance to UNICEF as a selection body would be to create an entirely new body of representatives to select mediators on behalf of the Convention. However, creating such a body from the ground up could be very costly, thus its success is probably more theoretical than practical.

potential candidates, and make final selections based on specific criteria and qualifications.

4. *Selection Standards and Training of International Mediators*

Another important issue is how the selection body would determine and apply selection criteria. Mediators in the U.S. have several tasks. The Test Design Project (“TDP”), an independent group, established a list of desired mediator characteristics based on the most common tasks that mediators perform in practice.²⁶¹ Many mediators and other interview subjects have offered general endorsements of this list.²⁶² The named qualities include: impartiality; effective identification and discovery of relevant information; awareness and concern for others’ needs; pursuit of collaborative and workable solutions; effectiveness in helping parties reach final solutions; effectiveness in managing interactions among the parties and dealing with conflicts; and “adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information.”²⁶³

Additionally, in 1989, the Society of Professionals in Dispute Resolution (“SPIDR”) led an investigation and ultimately handed down recommendations regarding mediator qualifications, including that a variety of organizations, as opposed to a single entity, establish such qualifications,²⁶⁴ and that qualification criteria draw primarily from performance as opposed to paper credentials.²⁶⁵ In establishing effective criteria for selecting international mediators, the TDP’s list of traits and the SPIDR’s recommendations serve as a good foundation. However, similar criteria and recommendations endorsed by other signatory nations should also be considered and incorporated with the ultimate goal of creating an internationally balanced and comprehensive list of mediator qualifications.

261. Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 308 (2004).

262. *Id.*

263. *Id.* at 310.

264. *Id.* This could be effectuated by having experts from various independent groups submit proposed qualifications. The selection body could be required to give due consideration to all of the proposals before creating a final list.

265. *Id.* This recommendation of selecting mediators based on performance as opposed to paper credentials could be achieved over time by evaluating international mediators based on past performance in Convention disputes.

A related issue is how mediators are to be trained after they are selected. Appropriate mediator training is critical to any effective mediation system, particularly if the system is designed to function on an international level.²⁶⁶ Some States already have legislation in place to regulate mediator training and qualifications.²⁶⁷ Alternatively, legal systems that do not regulate mediator training generally lack a uniform approach to mediator training requirements and qualifications.²⁶⁸

In cases involving international child abduction, the Hague Conference of Private International Law (“the Conference”) recommends that mediators have substantial experience in family law mediation, undergo additional training specifically tailored to international child abduction, and “continu[e] training to maintain their professional competence.”²⁶⁹ The Conference also encourages States to establish training programs and standards for such mediators and to make the names of specialists publicly available through family mediator lists.²⁷⁰ Further, States should provide for neutral evaluation and monitoring of these mediation services while moving towards common standards for evaluation.²⁷¹

One organization that already exists to improve the competence of family law mediators worldwide is the Academy of Professional Family Mediators (“APFM”). APFM’s vision is “[t]o be the premier international organization in the development of professional family mediation.”²⁷² To achieve its vision, APFM holds annual conferences for mediators,²⁷³ offers a variety of educational materials,²⁷⁴ and seeks to establish a comprehensive

266. *See id.* at 340.

267. *See* GUIDE TO GOOD PRACTICE, *supra* note 201, at 36. For example, in France, candidates must have professional experience or a national social or health sector diploma and must successfully make their way through a selection process. *Id.* Obtaining the diploma requires a heavily regulated curriculum, including 560 hours of law, sociology, and psychology training and 70 hours of actual practice. *Id.* A prospective French mediator can also obtain the requisite diploma through professional experience, which entails both an assessment by public authorities of the applicant’s admissibility and an assessment by an examination panel of “the development of skills [of the applicant] acquired through experience.” *Id.* at 36 n.133.

268. *Id.* at 36.

269. *Id.* at 38.

270. *Id.* at 39.

271. *Id.*

272. *APFM: About Us*, ACADEMY OF PROFESSIONAL FAMILY MEDIATORS, <http://apfmnet.org/pg7.cfm>.

273. *Id.*

274. *Id.* According to APFM’s opening newsletter, “Educational programs and opportunities will be provided through pre-conference and conference workshops, partnering with colleges, universities, mediation trainers, on-line distance learning, member-only collegial bulletin boards, webcasts, teleconferences, and a LISTSERV.” *Launch of the APFM*, ACADEMY OF PROFESSIONAL FAMILY MEDIATORS (Mar. 13, 2012), <http://apfmnet.org/pg45.cfm>.

educational program for family law mediators that will emphasize “experience and continuing education requirements.”²⁷⁵ APFM recently adopted standards for family law mediators.²⁷⁶ Standard II—competence—requires mediators to have specialized training in family mediation and the effects of family disputes on parents and children, “including knowledge of child development, adult psychopathology, domestic abuse and child abuse and neglect.”²⁷⁷ Mediators must also participate in relevant continuing education to ensure continuous improvement of their skills and should be tested for the competency of their work when possible.²⁷⁸

In selecting and training international mediators, all of these considerations should be taken into account. The selecting body should establish uniform criteria for choosing candidates with an emphasis on experience in mediating family law disputes. A training program should be implemented for selected candidates, focusing primarily on international parental child abduction, but also on the specific language, goals, and principles of the Convention. Relevant experience is highly desirable, but mediators should also be exceptionally familiar with the Convention itself so that they can lead families to solutions that are consistent with its purposes. Subsequent training programs should be held periodically to help mediators maintain their professional competence and adapt to changing standards. Experts throughout the world should make appearances at trainings in order to present new and valuable information regarding international standards of competence, how standards are transforming, and how to effectively address such changes.

Additionally, an organization similar to APFM should be established, except, as discussed above, with a more specialized focus on international parental child abduction. The new organization should adopt similar competency standards requiring mediators to participate in continuing education and arrange conferences where mediators can participate in workshops and continuously acquire new, relevant information. With a greater number of competent family law mediators among the pool of candidates, the selected international mediators will likely be more

275. *Launch of the APFM*, *supra* note 274.

276. *APFM Standards of Practice and Training Program Standards*, ACADEMY OF PROFESSIONAL FAMILY MEDIATORS, <http://apfmnet.org/pg38.cfm>.

277. *Standards of Practice for Professional Mediators*, ACADEMY OF PROFESSIONAL FAMILY MEDIATORS (Feb. 4, 2014), available at <http://www.apfmnet.org/docs/Standards%20of%20Practice%20Adopted%20at%202-2-14%20Board%20Meeting-Revised%202-20-14.pdf>.

278. *Id.*

effective. Moreover, individual Member States should follow the Conference's suggestion and initiate comprehensive training programs for family law mediators. Within the U.S., states have their own requirements for mediator training²⁷⁹ and continuing mediator education.²⁸⁰ However, because such requirements vary among states,²⁸¹ uniformity is unlikely at the national level. The U.S. and other Member States should work towards the establishment of nationwide training and continuing education programs for mediators in order to facilitate interaction and progress at the international level.

5. *Illustration of the Proposed International Mediation Process*

The following is an illustration of how international mediation would function in practice. A man and woman are married in the U.S. and raise a child there, thus presumably making the U.S. the child's State of habitual residence. Upon divorce, the parties assume legal joint custody of the child, whether by court decree or by the parties' own out-of-court arrangement. The mother then flees the country to take up residence in Japan, bringing the child with her in breach of the father's custody rights and thus in violation of the Convention. The father petitions for the child's return in Japan and the mother responds by invoking the Article 13(b) defense. Specifically, she alleges that the father suffers from mental illness and is too unstable to raise a child. She concludes that sending the child back to the U.S. would impose a "grave risk of psychological harm" to the child. She also alleges that the father has been physically violent

279. For example, in Florida, family mediators must complete one of six family mediation training programs approved by the Florida Supreme Court pursuant to Rule 10.100(c) of the Florida Rules for Certified and Court-Appointed Mediators. *How to Become a Florida Supreme Court Certified Mediator: Step By Step Guide*, FLORIDA MEDIATION GROUP (Feb. 16, 2011), available at <http://www.floridamediationgroup.com/about/HowToBecomeAMediatorCurrent.pdf>. As for New York, it requires mediators to undergo forty hours of training and have actual experience mediating cases, while training programs must provide experience-based learning opportunities and include a combination of "lecture, exercises, small group activities, mediation simulation, and role plays." *Mediation Training Curriculum Guidelines*, DIVISION OF PROFESSIONAL AND COURT SERVICES, OFFICE OF ALTERNATIVE DISPUTE RESOLUTION, available at http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf.

280. In Florida, certified mediators who seek renewal must complete sixteen hours of Continuing Mediator Education ("CME"), covering the topics of ethics, domestic violence, and diversity or cultural awareness. CME hours may be earned through a wide range of methods, including watching or attending a lecture, participating in Internet presentations, authoring written work submitted for publication with significant mediation-related content, or completing a "self-directed program" approved by a governmental licensing board. *How to Become a Florida Supreme Court Certified Mediator*, *supra* note 279.

281. See *id.*; *Mediation Training Curriculum Guidelines*, *supra* note 279.

towards her in the past, but there is no other evidence indicating that he ever physically harmed or would likely harm the child.

The Japanese court would probably be hesitant to send the child back to the U.S. because of its desire to protect the mother from potential domestic abuse, along with its biases towards maternal custody and preserving the child's national identity.²⁸² However, the parties would have the opportunity to stipulate to mediation, choose a mediator from the international panel, and reach an out-of-court solution. The mediator would, acting as a disinterested party, assist in the negotiation process, draft an opinion for judicial consideration, and promote consistency with the principles of the Convention. For purposes of neutrality, the mediator would not be permitted to have any connection to either State involved in the dispute. Furthermore, the mediator would have extensive knowledge, skills, and training with respect to international child abduction, thus making successful agreement more likely than in domestic family law mediation.

The parties and the agreed-upon mediator would then attend the mediation and attempt to negotiate a solution satisfactory to both sides. The mediator might lead the parties to an agreement such as: if the mother returns to the U.S., the father will move out of the family residence and have only limited, supervised visitation with the child. This agreement would stand at least until the State of habitual residence is able to investigate the matter further and determine whether the father presents an endangerment to the child. Alternatively, the father could agree to submit to evaluation and treatment by a mental health professional in exchange for the mother's agreement that he can resume normal visitation with the child thereafter.

Finally, the mediator would make findings and draft an opinion reflecting the terms and conditions of mediation, which the Japanese court would be obliged to consider. The Japanese court would then be able to adopt the drafted opinion as a judicial order and the U.S. court would have a means of registering a mirror order. Consequently, the parties would be legally bound to comply with the mediated agreement in both jurisdictions. Japan will not likely object to such an arrangement because it would anticipate reaping the benefits of mediation for its own citizens under the opposite circumstances—namely, where the U.S. is considering a child's prospective return to his or her habitual residence in Japan.

282. See Reynolds, *supra* note 30, at 382–84, 386–87.

6. Overarching Question: An Amendment to the Convention?

Presumably, the proposed solution of international mediation would require an amendment to the Convention. Article 40 of the Vienna Convention on the Law of Treaties (“VCLT”) covers amendments to multilateral treaties.²⁸³ Specifically, it requires that all Member States be given notice of and have a right to take part in “the decision as to the action to be taken in regard to such proposal,” as well as “the negotiation and conclusion of any agreement for the amendment of the treaty.”²⁸⁴ Any Member State that does not become a party to the amending agreement is not bound by that agreement.²⁸⁵ Consequently, before the international mediation system can function, every party to the Convention must be notified of the proposed amendment and have the opportunity to contribute to the shaping of the ultimate provision. The large number of current Member States could make this problematic. However, there are reasons to presume that most countries would willingly accede to an amendment establishing international mediation.

International mediation would better serve the interests of each country’s citizens. Hypothetically, any given country may currently find that during a particular period, about half of its Convention proceedings resulted in a total win for the resident parent, while the other half resulted in a total loss. Under a system of international mediation, this winner-loser dynamic would disappear and each case would likely be resolved in a way that is at least somewhat satisfactory to the resident parent. If Member States could manage to keep an open mind and appreciate the magnitude of this benefit, they would not hesitate to agree to the binding amendment.

Moreover, if certain States were to refuse the proposed amendment, it could likely be pursued without them.²⁸⁶ An amendment binding at least some of the parties to the Convention would surely be preferable to the current system, where every party decides cases according to its own standards. Over time, the benefits of the amendment will begin to materialize and hesitant Member States will be encouraged to reevaluate

283. See Vienna Convention on the Law of Treaties, art. 40, May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The U.S. and Japan are both VCLT “participants”; the U.S. signed the VCLT on April 24, 1970, and Japan acceded to it on July 2, 1981. UNITED NATIONS TREATY COLLECTION, VIENNA CONVENTION ON THE LAW OF TREATIES (last updated Sept. 16, 2014), https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en.

284. See Vienna Convention, *supra* note 283.

285. *Id.*

286. Article 40 of the VCLT, cited above, merely states that parties are not bound by an amending agreement if they are not a party to that agreement. It does not prohibit such amending agreements or provide that they will render all parties unbound. See *id.*

their cautiousness. Eventually, States will likely follow the lead of the amendment's proponents and accede to the new practice.²⁸⁷

V. CONCLUSION

In light of inconsistent American case law interpreting the Article 13(b) “grave risk of harm” exception to returning a child, as well as evidence illustrating that Japan may contravene the intent of the Convention, it is clear that certain aspects of the Convention require improvement. Currently, Member States’ courts may take advantage of the broad language of Article 13(b) and other exceptions as a means of serving their own citizens’ interests and injecting nationalistic bias into their decisions. In particular, for the past couple of decades, domestic violence has been a concern that American courts have dealt with in different ways and that Japanese courts will likely struggle with in the near future. For instance, since 2000, U.S. courts have experienced a dramatic shift towards allowing the Article 13(b) defense in domestic violence cases, recognizing the importance of evaluating the nature of previous abuse and considering whether authorities in the State of habitual residence will adequately protect both the children and the abused mothers.²⁸⁸ International mediation is an ideal way for the U.S. and Japan to conduct such evaluations and establish conditions to ensure the safety of the parties involved. Moreover, it would significantly reduce judicial burden by delegating to mediators much of the responsibility that would otherwise be placed on courts in Convention proceedings.

Significantly, the impact of international mediation would stretch beyond cases involving parties from the U.S. and Japan. Indeed, it would be equally as effective in nearly every Convention case involving parties from any two Member States. To illustrate, consider the signatories that the U.S. State Department’s 2014 report labeled as non-compliant: Costa Rica,

287. Generally, if certain States yet to ratify the Convention decided to do so in the future, but were hesitant about the international mediation provision, they could express a reservation to the treaty with respect to that provision. The VCLT defines reservations and explain their parameters. Reservations allow States to effectively exclude the legal effect of a specific provision or provisions of a treaty while still becoming a signatory to it. *See id.* arts. 2(1)(d), 19. However, the language of the Convention explicitly states that only two specific reservations are allowed, and this would not be one of them. *See* Convention, *supra* note 1, arts. 24, 26, 42. Hence, expressing a reservation to the international mediation provision would not be an option for future signatories.

288. Morley, *supra* note 149.

Guatemala, and Honduras.²⁸⁹ As for Costa Rica, the U.S. seems to be primarily concerned with a 2011 Costa Rican Supreme Court decision, which ruled that courts hearing Convention proceedings “should consider ‘the best interests of the child’ rather than habitual residence” in those cases.²⁹⁰ As for Guatemala, the concern—in 2013—related to a more general inconsistency in how courts apply the Convention’s principles.²⁹¹ For example, a 2012 appellate court decision affirmed a lower court’s decision to refuse return on the grounds that “Guatemalan law favors maternal custody.”²⁹² With respect to Honduras, “the Honduran judiciary continues to treat Hague cases as custody matters.”²⁹³

American unease with regard to these countries probably relates to the fact that they are carving out new ways to expand their courts’ subjective latitude in making Convention decisions. Under the current precedents, Costa Rican judges may rely on subjective justifications drawn from domestic law concerning the best interests of children.²⁹⁴ Similarly, Guatemalan judges may justify refusal of return on the basis of a purely local, cultural perspective that presumes mothers are better suited to the task of raising children than fathers.²⁹⁵ Meanwhile, Honduran courts are able to resolve Convention cases as custody decisions in contradiction of the Convention.²⁹⁶ Clearly, these countries are not only failing to comply with the goals and principles of the Convention, but they are injecting nationalistic bias.

Under the proposed solution of international mediation, these concerns would be largely eliminated. An international mediator would be far more qualified to make a “best interests” determination based on neutral principles and a thorough understanding of the circumstances of the case than a Costa Rican court with authority to decide what is in the best interests of children based on whatever legislation it happens to find important at the time.²⁹⁷ Likewise, an international mediator would be able to approach the situation from a neutral standpoint, overlook the maternal custody presumption, and make a careful determination of the most

289. 2014 REPORT ON COMPLIANCE, *supra* note 24.

290. *See id.* In June 2013, a Costa Rican court decided a return case under similar reasoning. *Id.*

291. *See* U.S. DEP’T OF STATE: BUREAU OF CONSULATE AFFAIRS, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2013), <http://travel.state.gov/content/dam/childabduction/compliance/Reports/2013.pdf> [hereinafter 2013 REPORT ON COMPLIANCE].

292. *Id.*

293. 2014 REPORT ON COMPLIANCE, *supra* note 24.

294. *See id.*

295. *See* 2013 REPORT ON COMPLIANCE, *supra* note 291.

296. *See* 2014 REPORT ON COMPLIANCE, *supra* note 24.

297. *See id.*

preferable post-return arrangements for the parties, where a Guatemalan court would likely circumvent the Convention's intent on the basis of a narrow, biased perspective.²⁹⁸ Moreover, unlike Honduran courts, which have wrongfully assumed authority to make custody determinations in Convention proceedings, international mediators would help resolve cases in accordance with the Convention by taking the power to determine such issues away from courts not located in the State of habitual residence.²⁹⁹

Under the current domestic resolution of Convention disputes, courts must choose winners and losers.³⁰⁰ With the option of international mediation, courts would be more inclined to return children to their States of habitual residence promptly because those courts would be assured of their citizens' safety abroad. Such safety could be satisfied through a wide range of mediated agreements. Successful implementation of international mediation in Hague Abduction Convention proceedings would thus significantly improve compliance, replacing the current "black or white" judicial approach with a more flexible, opportunistic system in which any combination of colors is possible.

298. See 2013 REPORT ON COMPLIANCE, *supra* note 291.

299. See 2014 REPORT ON COMPLIANCE, *supra* note 24.

300. See, e.g., Roosa, 1991 WL 204483, at *6 (ordering child's return to his habitual residence in Spain because the mother's allegations of the father's hostile and controlling behavior were insufficient to establish the "grave risk" of harm required by the Convention). Obviously, judges making decisions pursuant to the Convention must either order or refuse to order the child's return to his or her State of habitual residence. As a result, one parent "wins" in a sense, while the other "loses." Consider the hypothetical discussed above wherein an American child is taken to Japan by his mother in breach of his U.S. citizen father's custody rights. If the father petitions in Japan for the child's return and the Japanese court ultimately decides that the Article 13(b) defense applies, the father will not return to America with his child. At the same time, the child's mother, who presumably took the child to Japan intentionally, is permitted to remain there with the child.

